BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

JEFFREY PETERSON JR.	**COPP-2023-CFP-013**
v.	**COMMISSIONER GALLUS**
STEPHEN SCHREIBEIS	**PARTIAL DISMISSAL AND FINDING OF FACTS SUFFICIENT TO SUPPORT VIOLATIONS - AMENDED**

COMPLAINT

On August 10, 2023, Charles Jeffrey Peterson, Jr. of Glendive, Montana, filed the above-named campaign practices complaint against the Glendive Unified Schools via Stephen Schreibeis, Superintendent. The complaint alleged that Superintendent Schreibeis threatened "retaliation" and "voter intimidation" in an email that he sent to school district employees seeking support for levy and school bond issues to be voted upon in an upcoming election.

I determined that the complaint met the requirements of 44.11.106 ARM and requested a response from Mr. Schreibeis pursuant to Mont. Code Ann. "MCA" 13-37-132. The requested response was provided by Mr. Schreibeis through his counsel, Felt Martin PC, on August 24, 2023. In accordance with Montana law and COPP practices, the complaint, response, and other materials are posted for review on the COPP website.

A decision in this matter was first issued on April 9, 2024. The conclusion of that decision as it relates to the actions of Superintendent Schreibeis remains unchanged. However, upon review and discussion with stakeholders, I determined that additional clarification should be provided regarding 'properly incidental' activities and the exception for school superintendents outlined in MCA § 2-2-122(2(b). Minor changes exist

throughout this decision but the substantive amendments, including a discussion of legislative history, begin on page 8.

ISSUES

This decision addresses MCA § 13-35-215, Illegal consideration for voting; MCA § 13-35-218, Coercion or undue influence of voters; and MCA § 13-35-226, Unlawful acts of employers and employees, particularly as they relate to a school superintendent's ability to convey support for an upcoming school bond or levy.

BACKGROUND

Glendive Unified School (also Glendive Public Schools) is the established school district overseeing Dawson County High School, Washington Middle School, Lincoln Elementary School, and Jefferson Elementary School in Glendive, MT. Stephen Schreibeis is an employee of Glendive Public Schools, currently serving as Superintendent. On August 8, 2023, voters in Dawson County voted on a High School District Building Reserve Levy, as well as a High School District Bond. Montana law considers school levy and bond issue questions submitted to the people at an election to be 'ballot issues.' MCA § 13-1-101(6)(a). On July 20, 2023, Superintendent Schreibeis sent out an email to all school employees specifically discussing these particular upcoming elections and encouraging them to vote in those elections. *Complaint,* 3. Additionally, Superintendent Schreibeis collected publicly available voter information, stating in his email, "We have analyzed the voter roles [sic] and discovered that of our 190 current employees, 42 are not registered to vote, and 39 did not vote in the last election." *Id.* In this communication, in the context of the upcoming elections, Superintendent Schreibeis also addressed the allocation of the school budget to salaries and explicitly wrote that if the ballot issues did not pass "we

will be faced with the daunting reality of major cuts." *Id.* 4. Dawson County voters passed both measures by significant margins.[1]

While Montana law excludes candidates and political committees in certain school districts, like Glendive, from certain reporting laws under MCA § 13-37-206(1), it is important to note that all other laws still apply. For example, in *Peterson v. GPS Advocates*, COPP-2023-CFP-014, I dismissed reporting-based allegations but addressed allegations pertaining to whether there were sufficient facts to support violations of MCA §§ 13-35-214, 215, 218, 220 and 225. Even though the entirety of the complaint was ultimately dismissed, these particular provisions were generally investigated and decided upon. The same must occur here.

DISCUSSION

The complainant specifically alleges violations of two Montana election law statutes, "Illegal consideration for voting," MCA § 13-35-215 and "Coercion or undue influence of voters," MCA § 13-35-218. Additionally, the actions alleged indicate potential violations of MCA § 13-35-226 "Unlawful acts of employers and employees." This decision first addresses each of these statutes, and then, as all three of these statutes involve misdemeanors rather than civil penalties, I consider the sufficiency of the evidence, if any, under Montana's criminal code.

1. ***Illegal consideration for voting***

MCA § 13-35-215, Illegal consideration for voting, states:

> A person, directly or indirectly, individually or through any other person, may not: (1) before or during any election, for voting or agreeing to vote or for refraining or agreeing to refrain from voting at the election or for inducing another to do so: (a) receive, agree, or contract for any money, gift, loan, liquor, valuable consideration, office, place or employment for the person or any other person.

[1] According to the Dawson County Election Administrator, the Building Reserve Levy passed with 1943 persons voting yes, and 1140 persons voting no, and the Building Reserve Levy passed with 1874 persons voting yes and 1210 persons voting no.

In this matter, the complainant does not describe any individual circumstance where Superintendent Schreibeis acted in the manner proscribed by the statute, nor is any evidence provided from which I may consider if such activity occurred. The complainant does not assert that Superintendent Schreibeis promised or provided any money, gift, loan, liquor, valuable consideration, office, place, or employment to any person in return for agreeing to vote for the Dawson County school ballot issues or to refrain from voting against them. COPP's independent investigation, as required by MCA § 13-37-111, likewise, did not reveal such evidence. As I have not been provided any evidence that shows or suggests the actions described in MCA § 13-35-215, or discovered evidence per MCA § 13-37-111, I must dismiss this allegation.

2. Unlawful acts of employers and employees

> A public employee may not solicit support for or opposition to. . .the passage of a ballot issue while on the job or at the place of employment. However, subject to 2-2-121 and 2-2-122, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views. MCA § 13-35-226(4).

While MCA § 13-35-226(4) limits a public employee's right to expression, as with all limits on expression, it must be interpreted within the parameters of the First Amendment's free speech protections. These parameters direct how the statute is enforced but this does not render it meaningless or without purpose. The U.S. Supreme Court has held definitively that, "a government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605-606 (1967). The Montana legislature assures public employees retain their free speech rights by specifying "this section does not restrict the right of a public employee to. . .express personal political views." MCA § 13-35-226(4). Consequently, COPP

has consistently interpreted this statute in a manner that protects the expression of personal political views by public employees. *See Huntley v. Paxinos*, COPP (2000) and *Seher and Velazques v. Galt*, COPP (2004).

In determining if political speech by public employees goes beyond the allowed expression of personal political views, previous COPP decisions have enumerated four primary factors which help determine if particular speech is prohibited or alternatively, is allowed by the narrow tailoring of MCA § 13-35-226(4): whether the speaker 'solicit[s] support for or opposition to any. . .ballot issue;' whether that speech occurs 'on the job or at the place of employment;' whether the speech is 'incidental to another activity required or authorized by law;' and finally whether the implicated speech uses public resources. *See Huntley v. Paxinos*, COPP (2000) and *Seher and Velazques v. Galt*, COPP (2004).

Superintendent Schreibeis does not assert that he was not soliciting support for a ballot issue, that he was not 'on the job or at the place of employment, or that he did not use public resources. Rather, Superintendent Schreibeis asserts, through counsel, that his actions, in accordance with MCA § 2-2-122(2)(b) were "allowable under Montana law." The statute he identifies is referenced in MCA § 13-35-226(4) and does provide a specific exception for school superintendents as to what activities regarding ballot issues are properly incidental to another activity required or authorized by law." MCA § 13-37-226(4).

While I address each of the factors outlined above, special consideration is given to what actions are considered 'properly incidental' for a school superintendent in relation to ballot issues.

a. Soliciting support or opposition

Prior COPP decisions have determined that "a public employee can indicate his preference for a candidate, ballot issue, or political committee at work so long as the expression of personal political views does not become solicitation." *In the Matter of the Complaint Against Dennis Paxinos*, COPP-2000, at 9. In *Paxinos*, the Yellowstone County Attorney, at his place of employment,

facilitated a poll and endorsed candidates for Attorney General on behalf of the non-profit Montana County Attorney's Association.[2] The Commissioner held, "if a public employee's expression of personal opinions at work includes acts or words soliciting support or opposition to a candidate or ballot issue, such solicitation is prohibited by MCA § 13-35-226(3)."[3] Similarly, In *Monforton v. Laslovich,* when an employee engaged in some political activity but judiciously avoided solicitation, the Commissioner found no basis for a violation because, as "a matter of normal statutory interpretation, without solicitation there can be no violation of MCA § 13-35-226(4)." COPP-2016-CFP-002 (A).

Montana law only defines solicitation in the criminal code which cannot be readily applied to the facts of this complaint. However, a workable definition is provided by the Code of Federal Regulations governing Federal election law which can be applied to Montana election law and the situation at hand. Commissioners have often used federal regulations as guidance with respect to Montana law as I did in *VanFossen v. Missoula County Republican Central Committee, et. al.* COPP-2023-CFP-012, at 13-14. Here, there is applicable federal regulation that serves as appropriate guidance with respect to solicitation:

> [T]o solicit means to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. 11 CFR § 300.2(m).

Although "vote" is not specifically mentioned in the above definition, here, where an election is concerned and specifically the passage of a ballot issue is the desired result, a vote is undeniably something of value.

> 'Support for or opposition to' is clearly defined in Montana election law:
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> [S]upport or oppose", including any variation on the theme, means; (a) using express words, including but not limited to "vote", "oppose, "support", "elect", "defeat", or "reject", that call for the. . .passage or defeat of the ballot issue or other question

[2] In this decision the Commissioner dismissed the allegation because at the time MCA § 13-35-226 only applied to public employee's and not public officials.
[3] MCA § 13-35-226(3) has been renumbered as MCA § 13-35-226(4).

submitted to voters in an election. MCA § 13-1-101(54).

Superintendent Schreibeis begins his email by identifying the previous failure of similar ballot issues as a 'setback' and then throughout the email uses phrases of solicitation such as, "we need your help more than ever," "we need to get people out to vote," "mobilize our friends and families" and "now is the time to act." *Complaint*, 3. Superintendent Schreibeis' email was clearly composed and distributed with the intent of encouraging the employees of Dawson County Public Schools to vote in support of the upcoming ballot issues. Superintendent Schreibeis' email not only conveys his support for the ballot issue but cannot reasonably be considered to have any purpose other than to solicit support.

b. On the job or at the place of employment

The Montana legislature specifically limits this constraint on speech to that occurring 'on the job or at the place of employment.' "This provision of Montana's Campaign Finance and Practices Act is not an absolute prohibition against a state employee soliciting support for or opposition to a candidate or ballot issue "but only prohibits such solicitation while the employee is "on the job or at the place of employment." *In the Matter of the Complaint Against Dave Galt,* July 26, 2004, 5. In *Galt,* the complainant alleged that the Director of the Montana Department of Transportation violated MCA 13-35-226(4) when he wrote a letter to the editor soliciting support for a congressional candidate. Here, Galt indeed solicited support for a candidate, but he did so from his home and on his personal time and computer, not while on the job or at the place of employment, and although one newspaper included Galt's title in their publication, this was not at the request of Galt. *Id.* Consequently, the commissioner found no violation had occurred. Conversely, in *Doty v. Love*, when a school superintendent solicited support for school board nominees, he did so from his official school district email account and used his official title. COPP-2019-CFP-003. Therefore, the Commissioner found Superintendent Love was ""on the job" for the purposes of this statute," and had violated MCA 13-

37-226(4). Superintendent Schreibeis' actions are substantially similar to *Love* and are easily distinguished from *Galt*.

While Superintendent Schreibeis states that he wrote the email at home in his own time, he does not disagree with the complainant's contention that he sent the email from his school email address, using his school laptop, and may have done so from his office. (*Response*, 2.) He additionally signed the email with his official email signature as the Superintendent of Dawson County Public Schools. (*Complaint*, 4.) All available evidence indicates that this email, like Love's, was sent while Superintendent Schreibeis was on the job and from his place of employment.

c. *Properly incidental*

Superintendent Schreibeis' assertion that he was acting lawfully relies on MCA § 13-35-226(4)'s reference to MCA § 2-2-122. As previously stated, MCA § 13-35-226(4) provides "subject to. . .2-2-122, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law. . ." The relevant portion of MCA § 2-2-122 reads:

> With respect to ballot issues, properly incidental activities are restricted to:. . . (b) in the case of a school district, as defined in Title 20, chapter 6, compliance with the requirements of law governing public meetings of the local board of trustees, including the resulting dissemination of information by a board of trustees or a school superintendent or a designated employee in a district with no superintendent in support of or opposition to a bond issue or levy submitted to the electors. Public funds may not be expended for any form of commercial advertising in support of or opposition to a bond issue or levy submitted to the electors; MCA § 2-2-122(2)(b).

In his response, Superintendent Schreibeis, through council, selectively quotes the above statute to assert that sending the email was lawful.

> [T]here is a specific exception that allows such use of public time and facilities in regard to ballot issues, "including the dissemination of information by a board of trustees or a school

> superintendent. . .in support or opposition to a bond issues or levy submitted to the electors. Mont. Code Ann§ 2-2-121(3)(b)(i)(C).[4]" (Response, 2.)

COPP recognizes that public employees may, in the normal course of performing their duties, become involved in what onlookers may perceive as "political" activity - the dissemination of facts and information related to candidates or ballot issues up for election - that in reality serves an important public purpose, namely educating and informing the electorate. COPP has often found a public employee's political communications "properly incidental to another activity required or authorized by law" when such communications are informational only. See *Nelson v. City of Billings,* COPP 2014-CFP-052, *Essman v. McCulloch*, COPP-2014-CFP-056 and *Hansen v. Billings School District #2*, COPP-2013-CFP-027.

An important distinction is created by the statute quoted above. Specifically, the 'superintendent exception' the respondent relies on, provides not only for the dissemination of information as explained in the cases cited above, but information "*in support of or opposition to* a bond issue or levy submitted to the electors." MCA § 2-1-121(2)(b) *emphasis added.* While this distinction is significant, it does not provide school superintendents with free rein to support a ballot issue however they see fit.

The assertion by the respondent that soliciting support for the ballot issues was completely within his purview as superintendent directly contradicts basic tenants of statutory interpretation employed by the Montana Supreme Court, which holds "[W]e are required to avoid any statutory interpretation that renders any sections of the statute superfluous and does not give effect to all of the words used." *State v. Berger*, 259 Mont. 364, 367, 856 P.2d 552, 554 (1993). The Supreme Court further requires that "we interpret the statute as a whole, without isolating specific terms from the

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[4]In 2023, HB 412 moved the relevant portion of this statute to MCA § 2-2-122(2)(b) (2023).

context in which they are used by the Legislature." *City of Great Falls v. Morris*, 2006 MT 93, ¶ 19. If the Legislature had intended for a school superintendent to have carte blanche to support ballot issues, the restriction to 'compliance with public meeting laws and the resulting dissemination of information' would not only be superfluous but would render the statute oxymoronic.

I am generally reluctant to go beyond the plain language of the statute when the plain language is clear and unambiguous. "If the statutory language is clear and unambiguous, the statute speaks for itself and there is nothing left for the Court to construe." *Mont. Contractors' Ass'n v. Dep't of Highways*, 220 Mont. 392, 394, 715 P.2d 1056, 1058 (1986). I generally agree with the tenant that deciphering legislative history is "a lot like looking into a crowd and picking out your friends. Wald, Patricia M., *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195,214 (1983). However, there is some ambiguity as to what constitutes "the resulting dissemination of information" and what level of support or opposition is acceptable. Considering that this is the first time COPP has addressed this discrete issue, some discussion of legislative history is appropriate and will provide valuable guidance moving forward.

House Bill 302 which provided for the superintendent exception was introduced in 2005 by Representative Driscoll who maintained MCA § 2-2-122, at that time, unfairly tied the hands of a school superintendent whose job is to act as a spokesperson for the school board in conveying information to the community. Mont. H. Rep., Ed. Comm., *Hearing on HB 302*, (January 19, 2005).

In hearings before the House Education Committee and the Senate Taxation Committee, Representative Driscoll, and speaking as proponents; a representative of Montana School Boards Association (MSBA), and a school Superintendent from Billings, MT, described three issues HB 302 was designed to solve. First, when it comes to ballot issues, it is impracticable to expect communications, even those intended to be informational, to be void of even a

modicum of support. In fact, according to the proponents, a school superintendent is hired in no small part for their ability to communicate with the community and to be the voice of the school board (which proposes and supports ballot issues) when they are not in session. Next, school boards are required to have their meetings in public buildings – a use of public resources. Consequently, the moment a decision is made to support a mill levy, often acting on advice from the superintendent, any discussion of their support for the levy violates the statute. Finally, the uniqueness of a school superintendent's position means they are never fully off the clock and therefore it is difficult to determine under what circumstance they can provide their personal views.

HB 302 was entitled:

> A BILL FOR AN ACT ENTITLED: "AN ACT INCLUDING THE DISSEMINATION OF INFORMATION BY A BOARD OF TRUSTEES OR A SCHOOL SUPERINTENDENT RELATED TO A BOND ISSUE OR LEVY SUBMITTED TO THE ELECTORS AS "PROPERLY INCIDENTAL TO ANOTHER ACTIVITY REQUIRED OR AUTHORIZED BY LAW" . . ." Mont. H.B. 302.01 (2005).

The title of HB 302 references "dissemination of information" but does not mention support. However, the proposed text does:

> With respect to ballot issues, properly incidental activities are restricted to: . .(ii) the dissemination of information by a board of trustees or a school superintendent related to or in support of a bond issue or levy submitted to the electors." HB 302.01 (2005).

As signed into law, HB 302's text is substantially different from how it was introduced, and the hearing that lead to that change is informative. In the hearing before the House Education committee on January 19, 2005, one committee member questioned the school superintendent that spoke as a proponent. The member conveyed that he believed a superintendent's "position is as an informational source rather than an advocate of either side of an issue." The superintendent agreed with this statement but said "the issue is not whether the superintendent comes out as a proponent or opponent of an

issue, the issue is how finely does one have to craft his words to avoid political charges." The member expressed concern that "the bill is giving carte blanche to take a specific position rather than being an informational source." H. Ed. Comm. Jan. 19, 2005, at 5.

In an exchange with the bill sponsor, another member expressed concern for "the situation getting out of order and the superintendent not only becoming an advocate but a flag waver." The sponsor indicated that was not her or the Superintendent's intent and that "her aim is for a superintendent to be able to open the lines of communication." *Id.* at 6-7.

Another member, in an exchange with the representative from MSBA stated that "in his opinion what the bill is advocating is information for the public. From his reading of the bill, the superintendent will be able to go out and not be afraid of having frivolous charges filed against him or the district." MSBA agreed with this reading. *Id.* at 7.

Following additional discussion, a committee member asked MSBA ""What kind of an amendment should be written to make the bill clearer without getting into a proactive position?" MSBA replied:

> [A]n amendment would have to tackle the issue of the trustee in the school board room [sic], vigorously opposing or supporting the election. At present. . .the constitutional right to know, overrules what the present law states. The bill needs to be looked at carefully and make sure the committee is making sure there is a full right of discourse in the board room and a right to articulate, to distribute to the public, the decision of the board and the underlying rationale." *Id.* at 13.

At this time, the MSBA representative offered to work with the sponsor and the Superintendent on an amendment. *Id.* The amendment returned to and ultimately passed by the education committee read as follows:

> With respect to ballot issues, properly incidental activities are restricted to: (ii) the IN THE CASE OF A SCHOOL DISTRICT, AS DEFINED IN TITLE 20, CHAPTER 6, COMPLIANCE WITH THE REQUIREMENTS OF LAW GOVERNING PUBLIC MEETINGS OF THE LOCAL BOARD OF TRUSTEES, INCLUDING THE RESULTING dissemination of information by a board of trustees or a school superintendent OR A DESIGNATED EMPLOYEE IN A

DISTRICT WITH NO SUPERINTENDENT related to or in support of OR OPPOSITION TO a bond issue or levy submitted to the electors. HB 302.02 (2005).

Before the bill was ultimately signed into law, additional amendments were offered, striking "related to" and adding a prohibition on public funding of commercial advertising with the final language reading:

> With respect to ballot issues, properly incidental activities are restricted to: (b) in the case of a school district, as defined in Title 20, chapter 6, compliance with the requirements of law governing public meetings of the local board of trustees, including the resulting dissemination of information by a board of trustees or a school superintendent or a designated employee in a district with no superintendent in support of or opposition to a bond issue or levy submitted to the electors. Public funds may not be expended for any form of commercial advertising in support of or opposition to a bond issue or levy submitted to the electors. MCA § 2-2-122(2)(b).

The House Education Committee acknowledged the difficulty a school superintendent has in trying to avoid conveying support and recognized that conveying support is sometimes necessary. However, in order to avoid crossing over into direct advocacy and "flag-waving," the resulting statute specifically restricts a superintendent's actions to "compliance with the requirements of law governing public meetings. . .[and] the resulting dissemination of information in support or opposition." *Id.*

While the superintendent is now free to publicly share information, even if that information can be construed as support, the dialogue in the House Education committee makes it clear this exception requires communications to be primarily informational. Throughout the legislative process, legislators and proponents repeatedly focused on allowing a superintendent to convey information that is essentially supportive, while precluding direct advocacy. For example: a superintendent may share with the community the need for a levy or bond as determined by the board of trustees, even on school time, and may indicate the school board's support as well as his or her own. They may even draft brochures which provide information highlighting the need for a mill levy.

However, they may not use public resources to print banners which say "V*ote YES on May 8th.*"

While a superintendent may be called on to convey the boards of trustees' decision regarding ballot issues and related information – even including support or opposition, that is not the situation contemplated here. The email sent by Superintendent Schreibeis provides information regarding who did and did not vote in the last election – not information from the board of trustees – and includes language which unquestionably crosses the line into direct advocacy and 'flag-waving' such as "[t]he time to stand up for Glendive is now. . .we need to get people out to vote. . .mobiliz[e] our family and friends. . .and rally together and make a difference." (*Complaint*, 4.)

It is additionally relevant to note that political email communications sent to school employees, such as the one sent by Superintendent Schreibeis, forces public employees - other than himself - to read and engage in political activity using public resources.

Superintendent Schreibeis' actions cannot reasonably be considered properly incidental to his duties as school superintendent. To determine otherwise would require not only disregarding legislative intent but also the plain language of the statute.

d. The use of public resources

Finally, COPP has held that a public employee "does not relinquish her First Amendment rights by the mere fact that she may be a public official. . .so long as a public officer or employee is not using public time, facilities, equipment, supplies, personnel, or funds. "*AG's Opinion*, 2005. *Citing Dahl v. Uninsured Employers' Fund*, 1999 MT 168 ¶ 16, 5 Mont. 173, 983 P.2d 363. Here, Superintendent Schreibeis acknowledges that he used public resources, including his laptop, office, and the email list, to send a political email to all school employees. (*Response*, 4.) Clearly, Superintendent Schreibeis' use of public resources is more aligned with the actions of Superintendent Love who sent political emails from his school computer, than the use of personal

resources by MT DOT Director Galt, discussed in section (2)(b) of this decision.

e. *Conclusion MCA § 13-5-226(4) – Unlawful acts of employers and employees*

The email sent to Glendive public employees by Superintendent Schreibeis meets each of the four elements creating an unlawful act does not fall within the narrow exception provided under MCA § 2-2-122. The email solicited support for a ballot issue while both on the job and at the place of employment, was not properly incidental to his duties as superintendent, and public resources were used in its creation and dissemination.

Sufficient evidence exists to show Superintendent Schreibeis violated MCA § 13-35-226(4).

3. Coercion or undue influence of voters

The final statute under which I must consider Superintendent Schreibeis' actions is MCA § 13-35-218:

> 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. (1).

Undue influence is defined by Montana law only as it relates to contract law and has primarily been addressed by the courts in the context of either contracts or wills and estates.[1] Black's Law Dictionary refers to the definition provided by the Restatement (Second) of Contracts: "Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relationship between them is justified in assuming that the person will not act in a manner inconsistent with his welfare." Section 177(1)(1979), Black's Dictionary (11th Ed. 2019). In order to find that the Superintendent engaged in undue influence, I would have to find that the relationship between Superintendent Schreibeis was either a confidential one or a fiduciary one which would impose in him real or apparent authority and that he abused that relationship. While there could be any

number of relationships between the Superintendent and the other employees of Dawson County Public Schools, the complaint provides no evidence that any of the above relationships existed or that Superintendent Schreibeis' influence rose to the level of domination. Similarly, no evidence suggests that Superintendent Schreibeis used (or threatened to use) any type of force, violence, or restraint to compel Dawson County Public School employees to vote in favor of the ballot issues.

There are no definitions of "coerce" or "coercion" provided under Montana law but under a basic dictionary definition, "coerce" not only includes the use of force or threats but can also be as simple as "to compel to an act or choice" *Merriam Webster.* Compel (also used within the statute) is defined as "to drive or urge forcefully or irresistibly" or "to cause to do or occur by overwhelming pressure." *Id.* Therefore, Superintendent Schreibeis' email was coercive if it created overwhelming or irresistible pressure.

a. Misuse of official email lists

Prior COPP decisions provide only a limited analysis of coercion. However, while this exact circumstance is a case of first impression for COPP, prior commissioners have decided particularly relevant cases where the primary concern is the use of public employee's email addresses.

First, the Commissioner considered but dismissed allegations of coercion when a public officer and candidate for governor sent campaign emails to a limited number of government email addresses because that candidate exercised reasonable precautions in attempting to purge government email accounts from their list. *Mackin v. Mazurek*, Vaughey, 2000. In *Mackin*, a list of attendees had been obtained from a land use conference and some governmental email addresses went unnoticed when these were entered into a database. *Id.* 2. Although addresses were not involved, unintentional contact was also forgiven when DOT Director Galt's letter to the editor was published with his title. Director Galt did not indicate his title or ask that it be used when

he sent the letters. Therefore, this inadvertent contact was not considered coercive. *Seher & Valazquez v. Galt*, COPP-July 26, 2004.

Conversely, in *Thomas v. Gianforte*, the Commissioner determined that a candidate for governor engaged in coercion by purchasing an email list of state employee's email addresses and sending a campaign email to these addresses which stated in part: "I have officially launched my campaign for Governor and I need you on my team." COPP-2016-CFP-001, p. 2. Here, despite the fact that Gianforte was not in office at the time (unlike candidate Mazurek) and held no supervisory authority over the employees that he emailed, the Commissioner held that "deliberate, systemic campaign use of public employees' work addresses is coercion. . ." *Id.* 2.

Considering the limited analysis of coercion provided in the *Thomas v. Gianforte* decision, I am not convinced that I would have reached the same conclusion without additional evidence. A finding of coercion based entirely on the use of public employee email addresses, by a person without authority over the recipients, seems to this Commissioner to be an overly broad interpretation. However, in *Thomas* the Commissioner speculated about nearly the exact circumstance we consider here, noting "it would be jarring indeed for public employees to awaken to a campaign mailing at their work mailing addresses from a sitting public official." *Thomas*, 7, n. 4. Although Superintendent Schreibeis is not a public official, his position of authority over the recipients makes this situation even more alarming.

Not only does the situation at hand consist of deliberate systemic use of public employee's emails, but here we have nearly the exact situation the Commissioner warned of in *Thomas*. While coercion may be found based entirely on the above COPP decisions, this situation provides the additional element I found lacking in *Thomas v. Gianforte* - an authority figure abusing their access to employee email addresses in order to affect the outcome of an election.

The final factor I must consider in whether Superintendent Schreibeis' action amounted to coercion is whether his authority was of the type that could compel employees to act or not act in a particular way.

b. Supervisory authority

Montana courts have not specifically addressed this discrete issue, but a workable comparison is provided by labor relations law and what courts have termed 'supervisory coercion' as it relates to union organizing and the election of union representatives. As previously mentioned, federal regulations can serve as valuable guidance with respect to Montana law. Like Montana courts and their application of MCA § 13-37-226(4), courts deciding labor relations issues have endeavored to protect the free speech rights of employees – including supervisors. "Both an organizing campaign and an election involve the balancing of First Amendment freedoms of expression against the need to prevent coercion of employees and the balance is meant to preserve the employee's ability to make a free choice." *N,L.R.B. v. Reg'l Home Care Servs., Inc.*, 237 F.3d 62, 67 (1st Cir. 2001). Although not a direct correlation, these cases provide a useful analysis of the influence of supervisors on their employees and elections which affect the workplace.

In evaluating the effect of a supervisor's speech and actions on employees, courts apply a balancing test which weighs the right of supervisors to voice personal political views against the right of employees to make choices free of coercion. *Id.* The court considers the nature of the supervisory authority; the nature of the activity and speech of the supervisor; and finally, the context in which the supervisor acted. *Id.* 70.

First, the 'nature of the supervisory authority' refers to the supervisor's ability to affect the day-to-day lives of the employees, such as the ability to hire and fire, change work assignments, promote, grant time off, or otherwise manipulate the workplace. *Id., See also, N.L.R.B. v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980). The second element applied by the courts, a "fact-intensive" examination of the activities and speech of the

supervisor, generally focuses on the outspokenness of the supervisor and the level of their activity surrounding an election. Coercion has readily and consistently been found when a supervisor engages in "active and outspoken support of the Union throughout the organizing campaign." *ITT Lighting Fixtures, Div. of ITT Corp. v. N.L.R.B.*, 658 F.2d 934, 943 (2d Cir. 1981). Furthermore, the supervisor's actions are likely to be considered coercive if they "contain seeds of potential reprisal and intimidation." *N.L.R.B. v. San Antonio Portland Cement Co.,* 611 F.2d 1148, 1152 (5th Cir. 1980).

Context may be considered a separate factor, but the court commonly considers it in combination with the actions of the supervisor and asks what the employees might reasonably believe under the circumstances. *Reg'l Home Care Servs.,* at 69.

c. The balancing test as applied to Superintendent Schreibeis

This balancing test, as applied to the actions of Superintendent Schreibeis, clearly weighs in favor of a finding of coercion. First, Superintendent Schreibeis had significant supervisory authority - the Glendive Public Schools Board Policy Manual lists among the Supervisor's duties; "Recommend candidates for employment as certified and classified staff. . . Direct and assign teachers and other employees of the school under his/her supervision. . .Organize, reorganize and arrange the administrative and supervisory staff." Procedure 6110-P(1) (2018).[2]

The second and third portions of the balancing test require a detailed analysis of Superintendent Schreibeis' email and his use of voter registration information. The complainant asserts that the gathering and analysis of voter rolls "should be a direct violation of the CPP practices, this can be Voter Intimidation." (*Complaint,* 2.) In reality, upon request, through Montana's Secretary of State, an individual may obtain "a current list of legally registered voters and other available extracts and reports from the statewide voter registration system." MCA § 13-2-122. Therefore, Superintendent Schreibeis' actions in obtaining voter information do not violate Montana law. How that

information was used and disseminated to employees however, paints a concerning picture.

In his email, Superintendent Schreibeis states: "I have analyzed the voter roles [sic] and discovered that out of our 190 current employees, 42 are not registered to vote, and 39 did not vote in the last election." *Complaint*, 3. He goes on to state that if the implicated ballot issues do not pass, Dawson County schools "will be faced with the daunting reality of major cuts" and that currently 88.6% of the budget is allocated to salaries and benefits. *Id.* The reader of this email, having received it from their employer, can only infer that if the ballot issues do not pass, their employment could be at risk. While this may indeed be a reality, Superintendent Schreibeis used his authority, including his title and his access to employee email addresses, to create 'seeds of reprisal' by reminding employees that he is able and willing to obtain lists of who did and did not vote.

Not only did Superintendent Schreibeis strongly support the ballot issues, an employee could reasonably believe from his email that Superintendent Schreibeis may again access the voter rolls to identify who did and did not vote if indeed staffing cuts become a necessity,

Superintendent Schreibeis' position clearly gives him extensive supervisory authority; he actively and vociferously encouraged employees to vote for the ballot issues; and it would be reasonable for an employee to believe if they did not vote for the ballot issues, or refrained from voting, their employment under Superintendent Schreibeis may suffer. The totality of the circumstances supports a conclusion that Superintendent Schreibeis' activity was coercive.

4. Mens Rea

While the aforementioned statutes fall under my jurisdiction, they are "intended to supplement and not to supersede the provisions of the Montana Criminal Code." MCA § 13-35-101. Under Montana law, "a person is not guilty of an offense unless, with respect to each element described by the statute

defining the offense, a person acts while having one of the mental states of knowingly, negligently, or purposely." MCA 45-2-103. Therefore, while an action or activity may appear to be a violation, if I cannot establish that the alleged violator acted with the requisite mental state, I cannot conclude the action or activity rises to a level where criminal prosecution is warranted. *See Seward v. Andrick*, COPP-December 13, 2004. Therefore, in order for me to find that the respondent has violated a statute under Title 13, chapter 35, I must have evidence that they acted with the mental state of purposely or knowingly required by the criminal code. MCA § 45-2-103, *See also Scott v. Doyle*, COPP-May 31, 2011.

> MCA 45-2-101(35) ""Knowingly"--a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. . ."(65)
> ""Purposely"--a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct. . ."

It is clear by Superintendent Schreibeis' response that this email was sent knowingly and purposely. He makes no assertion that the email was accidently or inadvertently sent to employees, and furthermore states that it was completely in his purview as superintendent. (*Response*, 4.) While he may have indeed felt that his actions were within his duties, "Ignorance of the law is no excuse." *State v. Tichenor*, 2002 MT 311, ¶ 46. I do not need to conclude that Superintendent Schreibeis knew that he was violating the law, only that he knowingly or purposely engaged in the described conduct – sending the email. Knowingly or purposely sending the email fulfills the mental state requirement to find that Superintendent Schreibeis violated MCA §§ 13-35-228 and 226(4). Therefore, I find prosecution of these matters 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.[5] *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."[6] *Montana Freedom Caucus v. Zooey* Zephyr, COPP-2023-CFP-010, at 26.

When the commissioner finds sufficient evidence to justify a prosecution, the commissioner notifies the affected county attorney and transfers 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 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 criminal prosecution or the payment of a negotiated fine. MCA § 13-37-124(1), *See also, Bradshaw v. Bahr*, COPP-2018-CFP-008, at 4. In negotiating a fine, the commissioner may exercise his discretion and consider any and all mitigating factors. *Bradshaw*, 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,* 5. The district court will consider the matter de novo, providing full due process to the alleged violator.

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[5] An extensive discussion of the commissioner's discretion can be found in *Montana Freedom Caucus v. Zooey Zephyr*, COPP-2023-CFP-010.

[6] See also, *In the Matter of Citizens for More Responsive Government*, (*Motl v. CMRG*, COPP-2001-CFP-2/21/2002), *In the Matter of the Complaint Against Ronald Murray*, (*Washburn v. Murray*, COPP-2013-CFP-02), and *Fitzpatrick v. Zook*, COPP-2010-CFP-06/14/2011.

CONCLUSION

This Commissioner, having been charged to investigate and decide, hereby determines that Superintendent Schreibeis violated Montana election law and a civil or criminal action, or penalty under MCA § 13-37-128 is justified.

Although a detailed exploration of the superintendent exception described in section 2(c) was vital, the additional time taken in researching legislative history and amending this decision resulted in unintended consequences. Specifically, because violations of Chapter 35, Title 13, are misdemeanors, unless otherwise provided by law, prosecution of these matters must be commenced within 1 year after the act constituting a violation occurs. MCA § 451-205(2)(b). Consequently, I am compelled to dismiss the violation of MCA § 13-35-218 based on expiration of the statute of limitations.

MCA § 13-35-226(5) however, provides that a "person who violates this section is liable in a civil action authorized by 13-37-128, brought by the commissioner of political practices or a county attorney pursuant to 13-37-124 and 13-37-125." A civil action brought under MCA § 13-37-128 is subject to a statute of limitations of two years. MCA § 13-37-130.

Based on the foregoing discussion and the limits imposed by Montana law, I find the following:

- Superintendent Schreibeis did not violate MCA § 13-35-215, Illegal consideration for voting, and that allegation is hereby dismissed in full.

- Superintendent Schreibeis violated MCA § 13-35-218, Coercion or undue influence of voters, by using his access to employee emails and his influence as their supervisor to manipulate employee's election decisions. This violation is dismissed based on the expiration of the statute of limitations.

- Superintendent Schreibeis violated MCA § 13-35-226, Unlawful acts of employers and employees, by using public resources to solicit support for ballot issues while on the job or at the place of

employment. This violation will be enforced as a civil penalty as provided for in MCA 13-35-226(5).

This matter was previously referred to the Dawson County Attorney in accordance with the provisions of MCA § 13-37-124. The Dawson County Attorney declined to prosecute and referred this matter back to COPP. Most matters waived back to COPP are concluded with a negotiated settlement where mitigating factors are considered, and a penalty is assessed pursuant to MCA § 13-37-128. If negotiations are unsuccessful, the Commissioner may pursue the matter in State District Court.

Dated this 21st day of May, 2025.

Chris J. Gallus, Commissioner
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