

Options for Changing Laws Concerning the Office of Commissioner of Political Practices

prepared for the
State Administration and Veteran's Affairs Interim Committee
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Study Tasks

The State Administration and Veteran's Affairs Interim Committee was tasked by House Joint Resolution No. 1 (HJR 1) to examine:

- the nomination and selection process for the Commissioner of Political Practices;
- alternative structures for the Office of the Commissioner of Political Practices (COPP), including staff and budget;
- the scope of the duties of the COPP;
- the operational processes the COPP uses for handling complaints; and
- the enforcement powers and penalties.

Policy Goals

The policy goals articulated in HJR 1 were:

- reduce the perception of partisanship in the selection process;
- improve the effectiveness and efficiency of the COPP;
- ensure more immediate consequences and appropriate penalties.

The following sections include the statutes that SAVA could consider amending under each of the study task categories articulated above.

Nomination and Selection Process

Current Statutes

13-37-102. Creation of office -- removal. (1) There is a commissioner of political practices who is appointed by the governor, subject to confirmation by a majority of the senate. A four-member selection committee composed of the speaker of the house, the president of the senate, and the minority leaders of both houses of the legislature shall submit to the governor a list of not less than two or more than five names of individuals for the governor's consideration. A majority of the members of the selection committee shall agree upon each nomination.

(2) The individual selected to serve as commissioner may be removed by the governor prior to the expiration of the term only for incompetence, malfeasance, or neglect of duty. The governor's decision to remove the commissioner must be stated in writing, and the sufficiency of the governor's stated causes for removing the commissioner is subject to judicial review.

13-37-103. Term of office. Subject to the provisions of 13-37-104, the individual selected to serve as commissioner is appointed for a 6-year term and may not be reappointed to serve as commissioner.

13-37-108. Commissioner of political practices -- restrictions. During the commissioner's term of office, the commissioner may not knowingly, as defined in 45-2-101:

(1) hold another position of public trust or engage in any other occupation or business if the position of public trust or the other occupation or business interferes with or is inconsistent with the commissioner executing the duties of the commissioner's office;

(2) engage in any other occupation or business during the business hours of the commissioner's office unless the commissioner is in a leave status from the office;

(3) participate in any political activity or in a political campaign;

(4) make a contribution to a candidate or political committee or for or against a ballot issue or engage in any activity that is primarily intended to support or oppose a candidate, political committee, or ballot issue;

(5) attend an event that is held for the purpose of raising funds for or against a candidate, political committee, or ballot issue;

(6) participate in a matter pertaining to the commissioner's office that:

(a) is a conflict of interest or results in the appearance of a conflict of interest between public duty and private interest pursuant to Title 2, chapter 2; or

(b) involves a relative of the commissioner.

Ideas and Suggestions Offered in Discussions and Testimony

1. Provide that the Judicial Nomination Commission shall nominate the candidates for the Governor's consideration.
2. Amend the Montana constitution to prohibit an interim appointment of a Commissioner.
3. Replace the Commissioner with a Commission
4. No change
5. Others?

Staffing and Resources

Current statutes

13-37-112. Personnel and budget. (1) The commissioner shall select an appropriate staff to enforce the provisions of chapter 35 of this title and this chapter, and may hire and fire all personnel under the commissioner's supervision.

(2) The commissioner is responsible for preparing, administering, and allocating the budget for the office.

13-37-113. Hiring of attorneys -- prosecutions. The commissioner may hire or retain attorneys who are properly licensed to practice before the supreme court of the state of Montana to prosecute violations of chapter 35 of this title or this chapter. Any attorney retained or hired shall exercise the powers of a special attorney general, and the attorney may prosecute, subject to the control and supervision of the commissioner and the provisions of 13-35-240, 13-37-124, and 13-37-125, any criminal or civil action arising out of a violation of any provision of chapter 35 of this title or this chapter. All prosecutions must be brought in the state district court for the county in which a violation has occurred or in the district court for Lewis and Clark County. The authority to prosecute as prescribed by this section includes the authority to:

(1) institute proceedings for the arrest of persons charged with or reasonably suspected of criminal violations of chapter 35 of this title or this chapter;

(2) attend and give advice to a grand jury when cases involving criminal violations of chapter 35 of this title or this chapter are presented;

(3) draw and file indictments, informations, and criminal complaints;

(4) prosecute all actions for the recovery of debts, fines, penalties, or forfeitures accruing to the state or county from persons convicted of violating chapter 35 of this title or this chapter; and

(5) do any other act necessary to successfully prosecute a violation of any provision of chapter 35 of this title or this chapter.

Ideas and Suggestions Offered in Discussions and Testimony

1. Increase budget to allow another support staff person
2. Provide for a litigation fund
3. Require Commissioner to be an attorney to handle attorney caseload
4. No change
5. Others?

Scope of Duties

Current statutes

In summary, current statutes establish the scope of the COPP's duties as follows:

- Campaign practices/finances
- Lobbyist disclosure
- Public official ethics and financial disclosures

Ideas and Suggestions Offered in Discussions and Testimony

1. Examine lobbying and ethics statutes to clarify and clean up current statutes
2. Revise campaign reporting requirements
 - a. reduce number of reports
 - b. reduce amount of information that must be contained in the report, such as the employer occupation
 - c. eliminate 24-hour and 72-hour reporting
 - d. prohibit cash contributions
 - e. put a minimum threshold on what expenditures need to be reported
3. No change
4. Others?

Operational Process for Handling Complaints

Current statutes

13-37-111. Investigative powers and duties -- recusal. (1) Except as provided in 13-35-240 and this section, the commissioner is responsible for investigating all of the alleged violations of the election laws contained in chapter 35 of this title or this chapter and in conjunction with the county attorneys is responsible for enforcing these election laws.

(2) The commissioner may:

(a) investigate all statements filed pursuant to the provisions of chapter 35 of this title or this chapter and shall investigate alleged failures to file any statement or the alleged falsification of any statement filed pursuant to the provisions of chapter 35 of this title or this chapter. Upon the submission of a written complaint by any individual, the commissioner shall investigate any other alleged violation of the provisions of chapter 35 of this title, this chapter, or any rule adopted pursuant to chapter 35 of this title or this chapter.

(b) inspect any records, accounts, or books that must be kept pursuant to the provisions of chapter 35 of this title or this chapter that are held by any political committee or candidate, as long as the inspection is made during reasonable office hours; and

(c) administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, bank account statements of a political committee or candidate, or other records that are relevant or material for the purpose of conducting any investigation pursuant to the provisions of chapter 35 of this title or this chapter.

(3) If the commissioner determines that considering a matter would give rise to the appearance of impropriety or a conflict of interest, the commissioner is recused from participating in the matter.

(4) The commissioner is recused from participating in any decision in which the commissioner is accused of violating 13-37-108 or any other ethical standard.

(5) (a) If a campaign finance or ethics complaint is filed in the office of the commissioner against the commissioner, a supervisor within the commissioner's office shall within 10 business days forward the complaint to the attorney general, who shall within 45 days appoint a deputy in the case of a finance complaint or a deputy and a hearings officer in the case of an ethics complaint to make a determination in the matter of the complaint. The attorney general shall, to the extent practicable, ensure that there is no conflict of interest in the appointment of the deputy or hearings officer or in the provision of any legal advice to the office of the commissioner.

(b) A deputy appointed pursuant to this subsection must, in addition to complying with the requirements of subsection (6)(b), be an attorney licensed to practice law in Montana who is engaged in the private practice of law and who has liability insurance applicable to the purposes for which the deputy is appointed.

(c) If a complaint is filed against the commissioner, another employee in the office of the commissioner may not provide the commissioner with any information or documents concerning a complaint against the commissioner beyond that information or those documents

normally provided to persons in matters before the commissioner.

(6) (a) If the commissioner is recused pursuant to this section, the commissioner shall, except as provided in subsection (5), appoint a deputy, subject to subsection (6)(b).

(b) The deputy:

(i) may not be an employee of the office of the commissioner;

(ii) must have the same qualifications as specified for the commissioner in 13-37-107;

(iii) with respect to only the specific matter from which the commissioner is recused, has the same authority, duties, and responsibilities as the commissioner would have absent the recusal; and

(iv) may not exercise any powers of the office that are not specifically related to the matter for which the deputy is appointed.

(7) (a) Except as provided in subsection (7)(b), the appointment of the deputy is effectuated by a contract between the commissioner and the deputy. A contract executed pursuant to this subsection (7) must specify the deputy's term of appointment, which must be temporary, the matter assigned to the deputy, the date on which the matter assigned must be concluded by the deputy, and any other items relevant to the deputy's appointment, powers, or duties.

(b) If a deputy is appointed pursuant to subsection (5), the appointment of the deputy is effectuated by a contract between the supervisor who forwarded the complaint to the attorney general and the deputy or the deputy and the hearings officer, but the contract is construed to be with the office of the commissioner.

13-37-121. Inspection of statements and reports -- issuance of orders of noncompliance. (1) Each statement and report filed with the commissioner during an election or within 60 days after the election must be inspected within 20 days after the statement or report is filed. Intermediate Saturdays, Sundays, and holidays must be excluded in the computation of time under this section. If a person has not satisfied the provisions of this chapter, the commissioner shall immediately notify the person of the noncompliance. Notification by the commissioner may be accomplished by written or electronic communication or by telephone. If the person fails to comply after the notification, the commissioner shall issue an order of noncompliance as provided in this section.

(2) An order of noncompliance may be issued when:

(a) upon examination of the official ballot, it appears that the person has failed to file a statement or report as required by this chapter or that a statement or report filed by a person does not conform to law; or

(b) it is determined that a statement or report filed with the commissioner does not conform to the requirements of this chapter or that a person has failed to file a statement or report required by law.

(3) If an order of noncompliance is issued during a campaign period or within 60 days after an election, a candidate or political committee shall submit the necessary information within 5 days after receiving the order of noncompliance. Upon a failure to submit the required information within the time specified, the appropriate county attorney or the commissioner may initiate a civil or criminal action pursuant to the procedures outlined in 13-37-124 and 13-37-125.

(4) If an order of noncompliance is issued during any period other than that described in subsection (3), a candidate or political committee shall submit the necessary information within 10 days after receiving the order of noncompliance. Upon a failure to submit the required information within the time specified, the appropriate county attorney or the commissioner shall initiate a civil or criminal action pursuant to the procedures outlined in 13-37-124 and 13-37-125.

(5) After a complaint is filed with the commissioner pursuant to 13-37-111, the procedure described in this section regarding the provision of notice and issuance of orders of noncompliance is not a prerequisite to initiation of any other administrative or judicial action authorized under chapter 35 of this title or this chapter.

13-37-122. Judicial review of orders of noncompliance. A candidate or political treasurer who is the subject of an order of noncompliance may seek judicial review in the district court of the county in which the candidate resides or the county in which the political committee has its headquarters. All petitions for judicial review filed pursuant to this section must be expeditiously reviewed by the appropriate district court.

13-37-124. Consultation and cooperation with county attorney. (1) Except as provided in 13-35-240, whenever the commissioner determines that there appears to be sufficient evidence to justify a civil or criminal prosecution under chapter 35 of this title or this chapter, the commissioner shall notify the county attorney of the county in which the alleged violation occurred and shall arrange to transmit to the county attorney all information relevant to the alleged violation. If the county attorney fails to initiate the appropriate civil or criminal action within 30 days after receiving notification of the alleged violation, the commissioner may then initiate the appropriate legal action.

(2) A county attorney may, at any time prior to the expiration of the 30-day time period specified in subsection (1), waive the right to prosecute, and the waiver authorizes the commissioner to initiate the appropriate civil or criminal action.

(3) The provisions of subsection (1) do not apply to a situation in which the alleged violation has been committed by the county attorney of a county. In this instance, the commissioner is authorized to directly prosecute any alleged violation of chapter 35 of this title or this chapter.

(4) If a prosecution is undertaken by the commissioner, all court costs associated with the prosecution must be paid by the state of Montana, and all fines and forfeitures imposed pursuant to a prosecution by the commissioner, except those paid to or imposed by a justice's court, must be deposited in the state general fund.

13-37-130. Limitation of action. An action may not be brought under 13-37-128 and 13-37-129 more than 4 years after the occurrence of the facts that give rise to the action. No more than one judgment against a particular defendant may be had on a single state of facts. The civil action created in 13-37-128 and 13-37-129 is the exclusive remedy for violation of the contribution, expenditure, and reporting provisions of this chapter. These provisions are not subject to the misdemeanor penalties of 13-35-103 but may be a ground for contest of election or removal from office as provided in 13-35-106(3) and Title 13, chapter 36.

Ideas and Suggestions Offered in Discussions and Testimony

1. Separate investigation function - Require that staff conducts the investigation and that the Commissioner act more like a hearings judge
2. Require that a complaint be made during the election cycle, not after, or shorten the 4-year statute of limitations
3. Require COPP findings to be issued only after the election
4. No change
5. Others?

Enforcement Powers and Penalties

Current statutes

13-37-126. Names not to appear on ballot. (1) The name of a candidate may not appear on the official ballot for an election if the candidate or a treasurer for a candidate fails to file any statement or report as required by 2-2-106 or this chapter.

(2) A vacancy on an official ballot under this section may be filled in the manner provided by law, but not by the name of the same candidate.

(3) (a) In carrying out the mandate of this section, the commissioner shall, by a written statement, notify the secretary of state or the election administrator that a candidate or a candidate's treasurer has not complied with the provisions of this chapter, as described in subsection (1), and that a candidate's name may not appear on the official ballot.

(b) The commissioner shall provide the notification:

(i) within 8 calendar days after the earliest certification deadline provided in 13-10-208(1) for primary elections held pursuant to 13-1-107(1); or

(ii) by the earliest date specified under 13-10-208(2) for the county election administrator to certify the ballot for primary elections held pursuant to 13-1-107(2) or (3); and

(iii) by no later than 7 days before the ballot certification deadline provided in 13-12-201 for general elections.

13-37-127. Withholding of certificates of nomination or election. (1) A certificate of election may not be granted to any candidate until the candidate or the candidate's treasurer has filed the reports and statements that must be filed pursuant to the provisions of this chapter. A candidate for an elective office may not assume the powers and duties of that office until the candidate has received a certificate of election as provided by law. A certificate of election may only be issued by the public official responsible for issuing a certificate or commission of election.

(2) In carrying out the mandate of this section, the commissioner must, by written statement, notify the public official responsible for issuing a certificate of nomination or election that a candidate or the candidate's treasurer has complied with the provisions of this chapter as described in subsection (1) and that a certificate of nomination or election may be issued.

13-37-128. Cause of action created. (1) A person who intentionally or negligently violates any of the reporting provisions of this chapter, a provision of 13-35-225, or a provision of Title 13, chapter 35, part 4, is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to \$500 or three times the amount of the unlawful contributions or expenditures, whichever is greater.

(2) A person who makes or receives a contribution or expenditure in violation of 13-35-227, 13-35-228, or this chapter or who violates 13-35-226 is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in

13-37-124 and 13-37-125 for an amount up to \$500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

13-37-129. Liability and disposition of fines. In determining the amount of liability under 13-37-128, the court may take into account the seriousness of a violation and the degree of culpability of the defendant. If a judgment is entered against the defendant or defendants in an action brought by a county attorney in a court other than a justice's court, the county shall receive 50% of the amount recovered. The remaining 50% shall be deposited in the general fund of the state. In an action brought by the commissioner in a court other than a justice's court, the entire amount recovered shall be paid to the general fund of the state.

Ideas and Suggestions Offered in Discussions and Testimony

1. Formalize handling of campaign complaints to make it a contested case process
2. No change
3. Other?