

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

C.B. PEARSON v. NATIONAL ASSOCIATION OF REALTORS® /NAR FUND, MISSOULA ORGANIZATION OF REALTORS®, AND MISSOULA MAYOR POLITICAL COMMITTEE	COPP-2023-CFP-011 DISMISSAL
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COMPLAINT

On July 27, 2023, C.B. Pearson of Missoula, MT, filed a campaign practices complaint against the National Association of Realtors® Fund, Missoula Organization of Realtors®, and Missoula Mayor Political Committee (collectively Respondents). The complaint alleges that Respondents were involved in polling and related activities intended to support Missoula mayoral candidate Mike Nugent and that they failed to report certain related financial activities in compliance with Montana election law.

I determined that the complaint met the requirements of 44.11.106 ARM, and on August 4, 2023, COPP contacted both the complainant and the respondents to notify them that the complaint had been accepted as filed and to request each respondent provide a written response to the claims made. On August 14, 2023, I received the requested response from each individual respondent. On August 17 and 29, 2023, complainant Pearson contacted COPP via email to provide amendments to his original complaint, most notably a request to add National Association of Realtors® as a respondent. On August 31, 2023, COPP contacted complainant Pearson and all respondents to notify them that the amendments had been accepted and requested each respondent provide a supplemental written response addressing the amendments and providing certain information I deemed necessary to make an agency determination. On September 13 and 14, 2023, MOR and NAR/NAR Fund, respectively, provided responses to the complaint amendments and supplemental answers requested by COPP. In accordance with Montana law and COPP practices,

the complaint, responses, and other materials are posted for review on the COPP website.

ISSUES

This decision addresses the reporting of contributions and expenditures by political committees as required by Montana election law. MCA §§ 13-37-225, 229, and 231. Specifically, this decision addresses when certain activities constitute ‘support or opposition’ and how polling is valued for the purposes of campaign finance reporting.

BACKGROUND

The city of Missoula, Montana, held municipal primary and general elections on September 12, 2023, and November 7, 2023, respectively. During the period preceding the elections, each of the National Association of Realtors® Fund, Missoula Organization of Realtors®, and Missoula Mayor political committee, all registered with COPP as incidental political committees.¹ Each of the above-named committees filed campaign finance reports disclosing contribution and expenditure activity related to the City of Missoula’s mayoral election. None disclosed any activity related to candidate or issue polling as described by the complainant in this matter. Eight individuals filed as candidates with COPP seeking the office of Mayor in the City of Missoula. The first candidate to file was Mike Nugent, a Missoula City Councilman and Realtor®, who filed on August 25, 2022.

The National Association of Realtors® has an associated PAC, NAR Fund, whose purpose is to provide “funds that can be used to support candidates for political office who support Realtors® and the real estate industry.”² NAR provides a pathway to apply for funding which, if approved, is provided by NAR Fund. Each application for funding is approved on a case-by-case basis and may include an

¹ National Association of REALTORS Fund filed on May 3, 2023, Missoula Organization of Realtors filed on June 29, 2023, and Missoula Mayor political committee filed on June 1, 2023. The Missoula Mayor political committee was later reclassified as an independent committee.

²Independent Expenditures, National Association of REALTORS, <https://realtorparty.realtor/campaign-services/independent-expenditures>, last visited May 15, 2024.

application for “state and local candidate polling.”³ The application for polling requires that the association requesting the polling “have a desire to support a candidate. . .should the polling suggest that it is needed.”⁴ On December 15, 2022, Missoula Organization of Realtors® requested that NAR conduct polling for the purpose of “testing candidate viability.” Following approval of the request, polling was conducted April 3 through April 7, 2023, by a third-party vendor “American Strategies.” (NAR Supplemental Response, 2.)

The poll began by asking basic questions about respondents and their opinions on various issues related to the City of Missoula, without specifically mentioning the upcoming mayoral election or any declared or potential candidates. The poll then moved to a series of questions related to declared or potential candidates for the position of mayor. These questions ask the respondent their opinion of particular candidates on a range from *very unfavorable* to *very favorable*, or alternatively to indicate if they haven’t heard of the candidate or have no opinion. The respondents were then asked how likely they were to vote for a candidate, given a statement “why some people are voting for” a particular candidate, and asked how convincing that reason was to vote for the candidate. Next, the poll focused on how respondents felt about the job Jordan Hess was doing as interim mayor and how likely they would be to vote for Hess “if the election were held today?” The poll then asked seven questions that began “a reason why some people are voting for Mike Nugent” and asked, “how convincing of a reason is that for you?” Finally, the poll ends with demographic survey questions.⁵ (Complaint, 13-47.) Results of the survey were provided to MOR and NAR on April 11, 2023. A summary of results, provided to MOR and NAR, followed on April 17, 2023.

On June 1, 2023, Missoula Mayor registered with COPP as an incidental political committee, stating as their purpose, “Independent Expenditure Committee

³ State & Local Candidate Polling, National Association of REALTORS™
<https://realtorparty.realtor/campaing-services/independent-expenditures-html/state-local-candidate-polling-html>. Last visited May 15, 2024.

⁴ Supra at n. 3.

⁵ All polling questions are provided by the complainant in an addendum attached to the complaint available on COPP’s website.

to Support the next Mayor for City of Missoula, Mike Nugent.”⁶ Missoula Mayor’s initial C-6 report shows contributions of \$125,000 from NAR Fund and in-kind contributions from MOR of staff time and conference space usage valued at \$202.75. (COPP Records.)

The Missoula mayoral election was held on November 7, 2023, with Mike Nugent and candidate Andrea Davis receiving nearly all of the less than 25,000 votes cast. Andrea Davis won the contest with roughly 59% of the vote.⁷

DISCUSSION

The submitted complaint is based on the assertion that the poll was organized for the purpose of supporting Mike Nugent’s campaign for Missoula Mayor, and therefore the value of polling and related expenses must be reported as either contributions or expenditures by the involved committees. Respondents NAR/NAR Fund/ and MOR each respond by stating that the poll was exclusively meant to test Realtor® messaging and to determine if Mike Nugent was a viable candidate, but was at no time intended to support Nugent’s campaign or oppose other Missoula mayoral candidates.

The complainant contends that all Respondents were part of an organized effort to support Nugent through the poll and to disguise the source that funded the poll by not including it on their C-6 finance reports. The complainant additionally states that the poll “has and will be used to further the activity of both of these committees (NAR and MOR) and the political committee they formed - Missoula Mayor.” (Complaint, 4.)

The Missoula Mayor committee was indeed formed in order to support Nugent, as stated on their C-2 Statement of Organization. The co-treasurer of Missoula Mayor is also the CEO of MOR as indicated on each committee’s C-2 Statement of Organization. While Missoula Mayor did not report any in-kind contributions as polling or poll results, as previously mentioned, they reported a \$125,000 grant from NAR fund on their initial C-6 finance report.

⁶ Missoula Mayor was later reclassified by Commissioner Gallus as an independent committee.

⁷ <http://missoulacurrent.com/davis-missoulas-mayor/> last visited April 29, 2023.

Each respondent asserts that if the poll had any value, it was de minimis and therefore did not trigger reporting requirements.

The singular question of this decision is whether the poll, the poll results, subsequent summary, and supporting activities constitute contributions or expenditures under Montana election law that would trigger reporting requirements for any of the Respondents.

All expenditures made or contributions received by a political committee must be timely reported, including those made or received in-kind. MCA §§ 13-37-225(1), 229, 231, *Healthy Montana I-185 v. MATH*, COPP, Sept. 5, 2018, at 5.

A contribution is defined by statute as:

(i) the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to support or oppose a candidate or a ballot issue; (ii) an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution; (iii) the receipt by a political committee of funds transferred from another political committee; or (iv) the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee. MCA § 13-1-101(9)(a).

An expenditure is defined in relevant part by MCA § 13-1-101(21)(a) as:

a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value: (i) made by a candidate or political committee to support or oppose a candidate or a ballot issue. . . . iii) used or intended for use in making independent expenditures or in producing electioneering communications.

I. The poll is not a reportable contribution or expenditure because it was not organized to support or oppose a candidate.

The definitions of both expenditure and contribution include “anything of value” to “support of oppose” a candidate or ballot issue. Polling is an expensive proposition. Here, the complainant estimates the value of this poll to be between \$15,000 and \$25,000. (Complaint, 3.) A “thing of value” has been generously

construed to “include goods and services that have tangible, intangible, or even merely perceived benefits.” *The law of a ‘thing of value,’* Ellen Weintraub, FEC, 1. More specifically, the Federal Election Commission has specifically identified polling data to be a thing of value. *FEC Advisory Opinion* 2006-04, Tancredo. Nonetheless, as defined by the above statutes, ‘anything of value’ only becomes a contribution or expenditure under Montana election law if it is used to ‘support or oppose’ a candidate or ballot issue.

Montana election law explicitly provides for the definition of “support or oppose.”

[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 nomination, election or defeat of one or more clearly identified candidates. . .(b) otherwise referring to or depicting one or more clearly identified candidates. . . in a manner that is susceptible of no reasonable interpretation other than as a call for nomination, election, or defeat of the candidate. . . MCA § 13-1-101(54).

The above definition provides for two ways that the poll might ‘support or oppose’ a candidate. The first is through express words that support a candidate or call for the defeat of an opponent. The second is referring to a clearly identified candidate in a manner that is susceptible of no reasonable interpretation other than calling for the election or defeat of that candidate.

A complete list of polling questions was provided by the complainant. Although the wording of some of the questions paints Mike Nugent in a flattering light, they also do so (although to a lesser degree) for the other candidates. At no point does the poll request that respondents vote for, elect, or support Nugent, nor does the poll encourage respondents to defeat or reject any of Nugent’s opponents. Therefore, the poll does not expressly advocate for the support of opposition of any mayoral candidate.

The pollsters constructed several questions that conclude by asking “how good of a reason is this for you to vote for Mike Nugent?” The complainant

interprets these poll questions as advocating for the support of Nugent. While this may be a reasonable interpretation, considering the scantness of such questions regarding other candidates, the statute states that without express advocacy, the activity in question must be “susceptible of no reasonable interpretation other than as a call for. . .the election or defeat of the candidate.” MCA 13-1-101(54)(b). Here, NAR/NAR fund and MOR offer an alternative reasonable interpretation. They assert that the poll was conducted primarily as a candidate viability poll, intended only to determine if supporting Nugent would be worthwhile investment of their funds – essentially a smaller investment prior to spending additional money in support of Nugent. A secondary purpose of the poll was to test general Realtor® messaging. While refined messaging by Realtor® organizations may serve to benefit Nugent, this benefit would also apply to all other candidate/members of this large trade association. There is no evidence provided that this poll was used to refine messaging specifically for Mr. Nugent in order to support his candidacy or oppose that of the other mayoral candidates.

NAR’s website states that the first step in applying for funding is “to choose who will make a great candidate to support.” *Supra*, n.3. The application for “state and local candidate polling may be part of this process if approved on a case-by-case basis.” *Id.* Here, NAR states that an organization should have a “desire to support a candidate. . . *should the polling suggest it’s needed.*” *Id.*, emphasis added. Evidence indicates that polling is done in order to determine if supporting a particular candidate is a prudent use of funds.

Here, the Respondent’s alternative interpretation for the purpose of the poll is a reasonable one and is supported by the timing of the poll. The respondent organizations considered supporting Nugent, who as a Realtor® would serve their interests if elected, but did not want to invest significant resources if community support was lacking. MOR requested polling on December 15, 2022, while Nugent was the only registered candidate, but the committee to support him was not formed until approximately six months later after the addition of five new candidates had drastically changed the landscape of the race.

There is no evidence to support a conclusion that the implicated poll explicitly supported Nugent, or alternatively, was susceptible of no other reasonable interpretation but to support Nugent or oppose the other candidates. I cannot conclude that the poll or surrounding activities were intended to support or oppose candidate Nugent. Therefore, the poll is not a reportable contribution or expenditure under this definition.

II. The poll was not made in coordination with a candidate or ballot issue committee and therefore it is not a coordinated expenditure reportable as a contribution.

Under MCA § 13-37-101(9)(a)(ii) a contribution is “an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution.” “Coordinated,” including any variations of the term, means made in cooperation with, in consultation with, at the request of, or with the express prior consent of a candidate or political committee or an agent of a candidate or political committee.” MCA § 13-37-101(10). “A coordinated expenditure cannot be found in “activity by an individual acting solely on his or her own behalf independently of any candidate or the candidate’s agent[.]” *Eaton v. Jarussi*, quoting ARM 44.11.602(3)(b)(c), COPP-2018-CFP-010, at 16.

Here, while the poll was indeed coordinated by political committees, it was not coordinated with a candidate or ballot issue committee as required by the definition of contribution or expenditure. At no time does the complainant assert that the poll was made in coordination with Nugent, and none of the implicated committees are ballot issue committees. Likewise, no evidence provided shows any involvement on the part of Nugent.

I cannot conclude the poll was coordinated with a candidate or ballot issue committee and therefore the poll is not an expenditure or a reportable contribution under this definition.

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III. The poll was not used, or intended for use, in making independent expenditures or in producing electioneering communications.

MCA § 13-1-101(21)(a)(iii) specifies that a thing of value is an expenditure if it is “used or intended for use in making independent expenditures or in producing electioneering communications.” Under this definition, the poll would need to either be used or intended to be used in making independent expenditures or electioneering communications in order to be considered an expenditure that would trigger reporting requirements.

The possibility that independent expenditures or electioneering communications may result, (or even be likely to result) from a candidate viability poll, does not mean the poll was *intended* for such use. “Intend” is defined as “[t]o have in mind a fixed purpose to reach a desired objective; to have as one’s purpose.” *Intend*, Black’s Law Dictionary, 2024. As an independent expenditure must support or oppose a specified candidate, considering such a possibility does not create the requisite intent. This decision has already determined that the purpose of the poll, to test the viability of Mike Nugent as a candidate, is a credible assertion. As no candidate had yet been determined, it cannot be said that any of the Respondents intended or had the ‘fixed purpose’ to the use the poll results to make independent expenditures or electioneering communications to benefit Mike Nugent.

a. Independent expenditure

An independent expenditure is “an expenditure for an election communication *to support or oppose a candidate* or ballot issue made at any time that is not coordinated with a candidate or ballot issue committee.” MCA § 13-1-101(28), *emphasis added*. As previously established, it cannot be determined that the poll was conducted *to support or oppose a candidate* and therefore this definition does not apply. Furthermore, polling activities took place more than five months before the election and well in advance of the definitive selection of a candidate. Therefore, the poll could not be used for making an independent expenditure because an independent expenditure requires a candidate to support or oppose. While NAR Funds sole purpose is to promote independent expenditures on behalf of

state or local candidates, they do not personally select candidates to support, participate in polling, or coordinate independent expenditures and electioneering communications. (*NAR Fund Response*.) While Missoula Mayor's funds are directly traceable to NAR Fund, these funds have been properly reported. (COPP Records.)

b. Electioneering communication

An electioneering communication does not expressly support or oppose a candidate, but mentions a candidate by name and must take place "within 60 days of the initiation of voting in an election."⁸ The initiation of voting occurs when primary election ballots are mailed out to voters. In this election, that date was August 24, 2023. In order to be determined an electioneering communication, the polling would need to occur after June 24, 2023. Polling occurred more than two months prior to this date.

Although none of the respondents have denied that Missoula Mayor, the committee in support of Mike Nugent, through their connection to MOR, had access to the poll results, there is no evidence presented that they used those results in determining the purpose, timing, or content of any independent expenditures or electioneering communications. Complainant alludes to coordination by including a direct mailer that uses language similar to that used in a polling question. This mailer refers to hot button topics such as affordable housing, homelessness, and lower property taxes. (See Complaint.) The language used may be the original work of Missoula Mayor or may be influenced by any number of resources that research and report on issues important to Missoula voters. While the provided mailer is an independent expenditure, the assumption that it is the product of polling conducted

⁸ An electioneering communication (19) (a) "Electioneering communication" means 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.

months in advance of its dissemination is entirely speculative and there is no evidence provided to make such a determination or to cause me to doubt the veracity of Missoula Mayor's assertion that co-treasurer Jim Bachand saw no reason to "utilize the polling information beyond its initial value of determining any candidate viability in his capacity as the CEO for MOR." (Missoula Mayor Supplemental Response, 1.)

The single flyer/postcard presented by the complainant does not provide convincing evidence that the poll conducted was used or intended to be used in the production of electioneering communications or independent expenditures. Consequently, the poll is not a reportable contribution or expenditure under this definition.

IV. The poll did not result in compensation paid for the personal services of one committee's employees or members to another committee.

MCA § 13-1-101(9)(a)(iv) includes in the definition of contribution, "the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee." Consequently, each of the respondents is required to report any compensation paid for personal services provided by one of the other committees as a contribution.

Here, there is no evidence provided that any of the named committees provided personal services to any of the other committees that went unreported. Each of Missoula Mayor's C-4 finance reports disclose contributions from MOR for "staff time and conference space usage" totaling \$1725.71. (COPP Records.) No evidence has been provided to indicate any other shared staff time occurred. The fact that MOR, NAR, and NAR Fund each participated in some way, by funding, requesting, or conducting the poll, fails to show that the employees of any committee were providing personal services to any other committee. The allegation by the complainant that this activity occurred, and most importantly, that financial transactions occurred in support of this imagined activity, is pure conjecture and is

entirely unsupported by the evidence. No reportable contributions or expenditures exist under this definition.

V. Funds transferred from NAR Fund to Missoula Mayor were properly reported.

MCA § 13-1-101(9)(a)(iii) includes in the definition of contribution “the receipt by a political committee of funds transferred from another political committee.” A transfer of funds did indeed occur in the form of a \$125,000 contribution from NAR Fund and a \$10,000 contribution from MOR to Missoula Mayor. These contributions were each properly reported by Missoula Mayor, NAR Fund and MOR, on their June 1, May 3, and June 29, 2023, C-4 Committee Finance Reports respectively. (COPP Records.) While contributions and expenditures do exist under this definition, each was timely and properly reported. Consequently, no violation of campaign finance law occurred.

Summary

The complainant in this matter is correct in stating that candidate or issue polling can constitute reportable contribution or expenditure activity under Montana election law. *See Common Cause v. Montana Chamber of Commerce*, 38-40 (2000) and *Huntley v. Paxinos*, 10-16 (2000). Subsequent COPP decisions have clarified that any data or information collected from candidate or issue polling that is provided to a candidate or political committee and used by them to inform or influence expenditure activity, or other campaign strategy, is required to be reported to COPP “as in-kind contributions when” the candidate/committee “received the fruits of the activities.” *Healthy Montana for I-185 v. Montanans Against Tax Hikes*, COPP-2018-CFP-016A, at page 6.

Healthy Montana for I-185 specifically sets out that a committee receives the fruits of the activities – and is consequently required to report such as an in-kind contribution when, the information is “used to determine opposition, develop and create materials opposing. . .” 10. Conclusive evidence that the respondents used information or data from the poll to inform or influence expenditure activity or campaign strategy has not been presented. In their supplemental response,

Missoula Mayor asserts that co-treasurer Jim Banchard, who as the CEO of MOR is the individual with access to poll result, “saw no reason to utilize the polling information beyond its initial value of determining candidate viability.” (Missoula Mayor Supplemental Response, 1.) While it might seem reasonable to infer that Missoula Mayor used the poll results because they had access through Jim Banchard, there is no evidence provided to support this inference. As explained above, a single flyer addressing issues well known to be considered important to Missoula voters, does not provide evidence the poll results were used by Missoula Mayor. Without concrete evidence that the poll results were used to the benefit of Missoula Mayor, the fact that an officer of Missoula Mayor had access to the poll results through his position with MOR does not provide sufficient evidence of wrongdoing.

CONCLUSION

No evidence presented is sufficient to find that the results of the poll at issue created an expenditure or contribution that would trigger reporting requirements. The only contribution/expenditure occurring is the transfer of funds from NAR Fund to Missoula Mayor which was properly reported. All allegations made by the complainant have been considered as described above and are dismissed in full.

Dated this 26th day of December, 2024,



Chris J. Gallus
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