

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Jernigan v. Nicol No. COPP 2020-CFP-014A	DISMISSAL
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On May 14, 2020, Jeremy Jernigan of Helena, MT filed a campaign practices complaint against Nelly Nicol of Billings. The complaint alleged that candidate Nicol both accepted corporate contributions and failed to report coordinated expenditure activities as contributions received.

SUBSTANTIVE ISSUES ADDRESSED

Corporate contributions and coordination between a candidate and a political committee.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Nelly Nicol filed a C-1 Statement of Candidate as a candidate for State Auditor with the COPP on October 2, 2019. Katie Wenetta was listed as the campaign Treasurer, with no Deputy Treasurer provided. Candidate Nicol is currently employed by Victory Insurance Company, with her LinkedIn profile describing her job title as “Communications Manager, Secretary Treasure, Board of Directors”. (Commissioner’s Records.)

Finding of Fact No. 2: Victory Insurance Company is a private workers’ compensation insurance carrier based in Miles City, MT. Victory Insurance Company is registered as an Incorporated entity with Montana’s Secretary of State’s Office. Keith Brownfield is the company’s CEO. (Commissioner’s Records.)

Finding of Fact No. 3: Citizens for Government Transparency filed a C-2 Statement of Organization as an Independent political committee with the COPP on March 11, 2020. Gary Matthews was listed as the committee Treasurer, with Keith Brownfield as the Deputy Treasurer. The Purpose of Committee section of the C-2 indicated the committee Supported candidate Nelly Nicol. On committee finance reports filed with the COPP before this Complaint was received, Citizens for Government Transparency reported receiving \$65,700.00 in contributions from Victory Insurance Company, Inc. and making two (2) Independent Expenditures totaling \$55,200.00 in support of candidate Nicol, including \$9,700.00 paid to Lamar on April 20, 2020 for 12 billboards. Citizens for Government Transparency did not report making any direct contributions, either monetary or In-Kind, to candidate Nicol. (Commissioner's Records.)

Finding of Fact No. 3A: On March 11, 2020, Victory Insurance Company, Inc. Incidental Committee filed a C-2 Statement of Organization as an Incidental political committee with the COPP to report Victory Insurance Company's monetary contributions to Citizens for Government Transparency. On Incidental finance reports filed with the COPP before this Complaint was received, the Victory Insurance Company, Inc. Incidental Committee reported making monetary contributions totaling \$65,700.00 to Citizens for Government Transparency. Victory Insurance Company, Inc. Incidental Committee did not report making any contributions, either monetary or In-Kind, to candidate Nicol. (Commissioner's Records.)

Finding of Fact No. 4: On January 6, 2020 candidate Nicol timely filed her Initial C-5 campaign finance report, dated October 2, 2019 through December 31, 2020. Candidate Nicol did not report receiving any contributions from or making any expenditures to Victory Insurance Company or Citizens for Government Transparency. (Commissioner's Records.)

Finding of Fact No. 5: On March 20, candidate Nicol timely filed a Periodic C-5 campaign finance report, dated January 1, 2020 through March 15, 2020. Candidate Nicol did not report receiving any contributions from or making any expenditures to Victory Insurance Company or Citizens for Government Transparency. (Commissioner's Records.)

Finding of Fact No. 6: On April 20, candidate Nicol timely filed a Periodic C-5 campaign finance report, dated March 16, 2020 through April 15, 2020. Candidate Nicol did not report receiving

any contributions from or making any expenditures to Victory Insurance Company or Citizens for Government Transparency. (Commissioner's Records.)

Finding of Fact No. 7: This Complaint included photographs of three (3) images from candidate Nicol's Facebook page as well as an image of a billboard that all shared the same design and imaging (see Exhibit A). Each of the three (3) images from candidate Nicol's Facebook page included materials with an attribution message stating "Paid for by Nelly Nicol for State Auditor, PO Box 6505, Helena, MT 59604. Republican". The billboard contained an attribution message stating it was paid for by Citizens for Government Transparency. (Commissioner's Records.)

Finding of Fact No. 8: On May 18, 2020, candidate Nicol (through The James Brown Law Office, PLLC) provided the COPP with a formal response to this Complaint. The response stated that candidate Nicol neither paid "for the billboard placed by Citizens for Government Transparency or requested it be put up". The response also stated that Keith Brownfield (Victory Insurance Company CEO and Citizens for Government Transparency Deputy Treasurer) is candidate Nicol's father. (Commissioner's Records.)

Finding of Fact No. 9: On May 19, 2020, Citizens for Government Transparency (through Taylor Luther Group, PLLC) provided the COPP with a formal response to this Complaint. The response stated that "The creation of the Citizens for Government Transparency committee and its subsequent activities were unknown by Ms. Nicol- she was not consulted, asked for permission, or told about any of the activities" because committee Deputy Treasurer Brownfield "undertook those activities solely on his own volition". The response went on to emphasize that candidate Nicol played no role in the creation, design, or placement of the billboard referenced in the Complaint. The response stressed that "Mr. Brownfield appropriated the sign artwork from Ms. Nicol's signs used for her campaign after she had publicly posted them in yards, on Facebook, her website and several other public sources".

This response also contained a sworn affidavit from Keith Brownfield stating that candidate Nicol is currently employed by Victory Insurance but that she resigned from the company's Board of Directors in 2019 because of her decision to run for the State Auditor position, and that candidate Nicol was not involved in the creation of the Citizens for Government Transparency committee nor in planning or executing any of its activities. The affidavit also stated that "Victory Insurance Company has donated corporate

funds to CGT. The decision to donate funds was mine on behalf of the Company, and it was made without any knowledge or input from Nelly. In her position, Nelly is not informed of or involved with any political expenditures made by the Company”.

The response finally contained a copy of the invoice received by Citizens for Government Transparency from Lamar for the pro-Nicol billboards, which disclosed the committee as paying \$9,700.00 for the creation of the billboard design and its display at twelve (12) locations. (Commissioner’s Records.)

DISCUSSION

Corporate Contributions

The complainant alleges several billboards supporting the Nicol candidacy from an Independent committee constitute a corporate contribution accepted by candidate Nicol. The complainant argues candidate Nicol violated the Mont. Code Ann. §13-35-227 prohibition on the acceptance of corporate funds (either directly or indirectly) because the campaign coordinated the activity with the Citizens for Government Transparency political committee funded by corporate contributions.

While the complainant made no allegations that candidate Nicol accepted direct monetary contributions from corporate entities, it is still important to address that point. As an Incorporated entity, Victory Insurance Company would be prohibited from making direct monetary contributions to candidate Nicol (FOF No. 2). Any of the \$65,700.00 Victory Insurance Company contributed to Citizens for Government Transparency (CGT) would also have been prohibited from being tapped by CGT to make direct monetary contributions to candidate Nicol because they were corporate funds (FOF No. 3). Candidate Nicol did not report receiving any monetary contributions from either Citizens for Government Transparency (CGT) or Victory Insurance Company (FOF Nos. 4-6). Neither CGT nor Victory Insurance Company reported making any direct monetary contributions to candidate Nicol (FOF Nos. 3, 3A).

It is also necessary to determine which entity directly financed the billboards referenced by this Complaint. CGT reported spending \$9,700.00 for the purchase of twelve billboards supporting candidate Nicol on finance reports filed with the COPP, and the 'Paid for by' attribution message included on the materials clearly indicated they were paid for by that committee (FOF Nos. 3, 7). In response to this Complaint, CGT provided the COPP with copies of receipts, invoices, and other documentation received by the committee from Lamar regarding the purchase of the billboards (FOF No. 9). Based on this documentation, CGT, not the Nicol campaign, was the entity responsible for financing the billboard/s in question.

While candidate Nicol did not accept direct monetary corporate contributions or finance the billboards in question, the Commissioner examines whether the billboards were coordinated between the Nicol campaign and CGT. Mont. Code Ann. §13-1-101(10) defines coordination:

“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”.

44.11.602(1), ARM, expands on this definition:

A "coordinated expenditure" means any election communication, electioneering communication, or reportable election activity that is made by a person in cooperation with, in consultation with, under the control of, or at the direction of, in concert with, at the request or suggestion of, or with the express prior consent of a candidate or an agent of the candidate. The coordination of an expenditure need not require agreement, cooperation, consultation, request, or consent on every term necessary for the particular coordinated expenditure, but only requires proof of one element, such as content, price, or timing, to be met as a fact of a coordinated expenditure.

44.11.602(5), ARM further clarifies that a coordinated expenditure qualifies as an in-kind contribution received by the candidate or intended beneficiary of the activity and must be reported as such. The coordination of campaign expenditure activity financed with corporate funds between a

candidate for elected office and an outside entity would leave that candidate in violation of Mont. Code Ann. §13-35-227.

As stated by Deputy Commissioner of Political Practices Kirsten Madsen stated in her Dismissal of *Eaton v. Gene Jarussi*, COPP-2018-CFP-010¹ (emphasis added):

Coordination—that is, a campaign practice violation based on the failure to report coordination—has been found only in particular, limited circumstances by prior Commissioners. *Ponte v. MT BASE*, 2014-CFP-012, at 4-8 (discussing coordination decisions of COPP going back to 1997); *id.* (rejecting as frivolous a complaint alleging coordination in a shared expense for a kick-off party; finding such a weak allegation would “likely implicate[] any association between any entity and a candidate including picnics, award ceremonies and workshops”). Prior decisions have found coordination “only on the basis of a specific act(s) of coordination and have never assumed coordination based solely on a relationship.” *Dick v. RSLC*, 2012-CFP-038, at 11 (fn 18 omitted (re FEC approach)); see also *id.*, at 14-16 (analyzing requirement for specific acts of coordination); accord ARM 44.11.602(4)(a). Said another way, to find coordination there must be something more than a generalized connection.

In this specific case, the generalized connection between candidate Nicol and CGT is candidate Nicol’s employer. Candidate Nicol is currently employed by Victory Insurance Company (FOF No. 1). At the time this complaint was filed, Victory Insurance Company had contributed \$65,700.00 to CGT (FOF No. 3). CGT in turn reported spending \$55,200.00 in support of candidate Nicol (FOF no. 3). CGT’s Deputy Treasurer, Keith Brownfield, is both the current CEO of Victory Insurance Company and candidate Nicol’s father (FOF Nos. 2, 8).

Based on past precedent applied by the COPP in cases of alleged coordination, however, none of these relationships by themselves prove coordination. In defining coordinated activities, 44.11.602(4)(a), ARM, clearly states that an expenditure is not coordinated solely because “of personal or

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<http://politicalpractices.mt.gov/Portals/144/2018decisions/Eaton%20v.%20G.%20Jarussi.vFINAL-signed.pdf?ver=2018-04-20-151720-040>

professional relationships between a candidate and other persons”. To prove that the billboards were coordinated between candidate Nicol and CGT, it must be shown that they were purchased by CGT “in cooperation with, in consultation with, at the request of, or with the express prior consent of” candidate Nicol or her campaign, §13-1-101(10), MCA.

In her official response to this Complaint, candidate Nicol denied any involvement with the creation, placement, or payment of the billboards (FOF No. 8). Similarly, CGT denied any involvement by candidate Nicol in the planning, production, or payment of the billboards, or any other committee activity. As part of CGT’s response, Mr. Brownfield provided a signed and sworn affidavit confirming that candidate Nicol is a current employee of Victory Insurance Company stating (in part) that candidate Nicol “resigned her seat on the Board of Victory Insurance Company” upon deciding to run for the Auditor position, and that “Nelly was not consulted, informed, or asked permission when I formed CGT nor has she been consulted, informed of or asked permission regarding any of its subsequent activities...I have not consulted with Nelly or any of her campaign staff or agents about my activities or those of CGT, including the creation and purchase of the billboards” (FOF No. 9). The affidavit also states that “Victory Insurance Company has donated corporate funds to CGT. The decision to donate funds was mine on behalf of the Company, and it was made without any knowledge or input from Nelly. In her position at the Company, Nelly is not informed of or involved with any political expenditures made by the Company”.

Mr. Brownfield’s affidavit stated of the billboard design that candidate Nicol had not provided campaign artwork or materials to CGT for its use, but that “When Lamar asked me what I wanted to put on the billboards, I had not thought much of it, but liked the signs Nelly had created for her campaign...It is my understanding pictures of the signs were also on Facebook and available on other public sources. I found a copy of the sign image digitally stored on our system and emailed that to Lamar to create the billboard artwork”. Included

with the affidavit were copies of emails exchanged between Mr. Brownfield and Lamar about the billboard artwork.

Considering all facts as presented in this matter, it cannot be concluded that the billboards paid for by CGT were coordinated with the Nicol campaign. No evidence has been provided or uncovered to dispute the statements contained in Mr. Brownfield's signed and sworn affidavit that the billboards were independently purchased by CGT. Indeed, all available evidence confirms this assertion. The facts of this case cannot prove that the billboards were created, purchased, or placed "in cooperation with, in consultation with, at the request of, or with the express prior consent of" candidate Nicol or representatives of her campaign.

As the billboards were not coordinated with the Nicol campaign, they would not qualify as a contribution received by the campaign. This means that candidate Nicol did not receive corporate contributions in any form. The allegation that her campaign accepted corporate contributions in violation of §13-35-227, MCA is hereby dismissed.

Reporting of Contributions

This Complaint also alleges that candidate Nicol failed to report all contributions received. Specifically, the complainant argues that since the billboards were coordinated between candidate Nicol and CGT, candidate Nicol was required to include them as contributions received on finance reports filed with the COPP. As previously stated, candidate Nicol did not report receiving any contributions from CGT, either monetary or in-kind (FOF Nos. 4-6).

§13-1-101(9), MCA defines a contribution as:

(9) (a) "Contribution" means:

(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.

(b) The term does not mean services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee or meals and lodging provided by individuals in their private residences for a candidate or other individual.

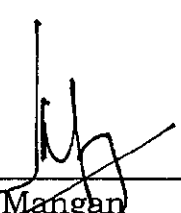
(c) This definition does not apply to Title 13, chapter 37, part 6.

As determined earlier, the billboards referenced by this complaint were not coordinated between candidate Nicol and CGT, and thus would not qualify as a contribution under subsection (9)(a)(ii). The activity was carried out by CGT independent of the Nicol campaign. Similarly, the billboards were not “received” by candidate Nicol; they were publicly posted for public consumption, not privately provided to the Nicol campaign for their use. Because the billboards do not qualify as a contribution made to candidate Nicol, she was under no obligation to report them as a contribution received. This allegation is hereby dismissed.

DECISION

The Complaint is hereby dismissed.

DATED this 1st day of February 2021.



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