



FEDERAL ELECTION COMMISSION
Washington, DC 20463

Via Electronic Mail Only

scott@hubayllc.com

Alaina Shearer for Congress
Scott M. Hubay, Treasurer
P.O. Box 305
Lewis Center, OH 43035

May 13, 2022

RE: MUR 7792
Alaina Shearer for Congress
and Scott M. Hubay, as treasurer

Dear Mr. Hubay:

On September 17, 2020, the Federal Election Commission (the "Commission") notified you and your client, Alaina Shearer for Congress, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided you and your client with a copy of the complaint.

After reviewing the allegations contained in the complaint, your response, and publicly available information, the Commission on April 26, 2022, found reason to believe that Alaina Shearer for Congress and you, in your official capacity as treasurer, violated 52 U.S.C. § 30104(b)(4), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is enclosed for your information.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations, but is a voluntary step in the enforcement process that the Commission is offering to you and your client as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that you and your client violated the law. Enclosed is a conciliation agreement for your consideration

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Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If you and your client are interested in engaging in pre-probable cause conciliation, please contact Don Campbell, the attorney assigned to this matter, at (202) 694-1650 or (800) 424-9530, within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days. *See* 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A). Conversely, if you and your client are not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at https://www.fec.gov/documents/2100/respondent_guide.pdf.

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹

This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act.

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in blue ink, appearing to read "Allen Dickerson", written over a horizontal line.

Allen Dickerson
Chairman

Enclosures
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Alaina Shearer for Congress, and **MUR 7792**
Scott M. Hubay in his official
capacity as treasurer

I. INTRODUCTION

This matter involves the failure to report the ultimate payees and the misreporting of \$236,986.21 in salary payments to employees of the principal campaign committee of 2020 Ohio congressional candidate Alaina Shearer as state party payroll payments by the Ohio Democratic Party (“ODP”). The complaint alleges that what appeared to be ODP salary payments to candidate Shearer were an impermissible personal use of campaign funds and that ODP misreported its apparent subsidy of the Shearer campaign as state party payroll expenses.¹ The Shearer Committee Response explains that Shearer’s campaign committee transferred funds to ODP, which provided a payroll processing service for employees of this federal candidate campaign committee. The Shearer Committee acknowledges that its reporting of the disbursements to ODP did not identify any of the specific campaign staff members, including the candidate, who later received the salary payments.

Based on the available information, and for the reasons set forth below, the Commission finds no reason to believe as to the allegation that Shearer, and Alaina Shearer for Congress and Scott M. Hubay, in his official capacity as treasurer (the “Shearer Committee”) violated 52 U.S.C. § 30114(b)(2) by making impermissible candidate salary payments or 52 U.S.C. § 30116(f) by accepting excessive contributions in the form of salary payments to Shearer.

¹ Compl. at 2 (Sept. 10, 2020). Shearer filed her Statement of Candidacy for the U.S. House of Representatives in Ohio’s 12th District on October 22, 2019, and the Shearer Committee filed its Statement of Organization on the same day; Shearer lost in the general election on November 3, 2020.

1 However, the Commission finds reason to believe that the Shearer Committee violated 52 U.S.C.
2 § 30104(b)(4) by improperly reporting the purpose of its disbursements to ODP and failing to
3 report the resulting salary payments to specific campaign committee employees.

4 **II. FACTUAL AND LEGAL ANALYSIS**

5 **A. Background**

6 ODP is a state committee of the Democratic Party.² Alaina Shearer was a 2020 candidate
7 for the U.S. House of Representatives in Ohio's 12th Congressional District. Alaina Shearer for
8 Congress was her principal campaign committee.

9 This Complaint alleges that ODP, Shearer, and the Shearer Committee (collectively,
10 "Respondents") engaged "in an unlawful scheme to violate the federal campaign finance laws,"
11 when ODP paid a salary to Shearer in 2019-2020.³ The complaint alleges that because these
12 payroll-related payments came from ODP instead of the Shearer Committee, the disbursements
13 constitute a personal use of campaign funds.⁴

14 The response filed on behalf of the Shearer Committee (the "Candidate Response"),
15 asserts that the candidate campaign committee provided the funding for all "payroll" payments
16 made to Shearer, as reported by ODP, and that ODP was merely an intermediary providing a

² Patricia Frost-Brooks is the current treasurer of the Ohio Democratic Party, and is named in this matter in her official capacity as treasurer. Fran Alberty was the committee treasurer during the 2020 election cycle.

³ Compl. at 2-5. *See also, e.g.*, Ohio Democratic Party 2020 June Monthly Report (Aug. 24, 2020) at 52, 54, <https://docquery.fec.gov/pdf/245/202008249266982245/202008249266982245.pdf>. The complaint also alleges that the Financial Disclosure Report that Shearer filed with the Clerk of the U.S. House of Representatives on May 15, 2020, states that, as of that date, Shearer had received \$21,527.38 in "Salary" from the "Ohio Democratic Party/Campaign." Compl. at 3. *See also* Alaina Shearer U.S. House of Representatives Financial Disclosure Report (May 15, 2020), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2020/10036016.pdf.

⁴ Compl. at 6.

1 service as a payroll processor.⁵ The Candidate Response states that the campaign sent funds for
2 payroll to ODP's Federal Account and ODP then processed payroll for the Shearer Committee.⁶
3 The Candidate Response does not address any of the alleged reporting issues.

4 **B. Legal Analysis**

5 **1. There is No Reason to Believe the Salary Payments to Shearer were** 6 **an Impermissible Personal Use of Campaign Funds or Constituted** 7 **Excessive Contributions to the Shearer Committee**

8
9 Under the Federal Election Campaign Act of 1971, as amended (the "Act"), and
10 Commission regulations, personal use means any use of funds in a campaign account of a present
11 or former candidate to fulfill a commitment, obligation or expense of any person that would exist
12 irrespective of the candidate's campaign or duties as a Federal officeholder.⁷ Salary payments
13 by a candidate's principal campaign committee to the candidate are permitted under the
14 regulations with certain conditions.⁸ The candidate's salary must be paid from his or her
15 principal campaign committee.⁹ The salary payments must not exceed the lesser of the
16 minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks

⁵ Candidate Resp. at 1. (Nov. 3, 2020).

⁶ *Id.* In reports filed with the Commission, the Shearer Committee reported multiple disbursements to ODP identified as "Contribution" and "Contribution — Payroll," but the entries failed to itemize which individuals were the ultimate recipients of the salary payments. Each disbursement lacked any memo item descriptions identifying individuals who would be paid from the "payroll" disbursement.

⁷ 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g).

⁸ See 11 C.F.R. § 113.1(g)(1)(i)(I); Explanation and Justification, Disclaimer, Solicitation and Personal Use Regulations, 67 Fed. Reg. 76,962, 76,971–76,973 (Dec. 13, 2002) ("Personal Use E&J"); see also FEC CAMPAIGN GUIDE FOR CONGRESSIONAL CANDIDATES AND COMMITTEES at 53-54 (June 2014). <https://www.fec.gov/resources/cms-content/documents/candgui.pdf> ("FEC Candidate Guide").

⁹ Personal Use E&J at 76,971–76,973. A candidate's salary or wages earned from bona fide employment are considered his or her personal funds. 11 C.F.R. § 100.33(b). However, compensation paid to a candidate in excess of actual hours worked, or in consideration of work not performed, is generally considered a contribution from the employer. 11 C.F.R. § 113.1(g)(6)(iii).

1 or the earned income that the candidate received during the year prior to becoming a candidate,
2 but any earned income that a candidate receives from salaries or wages from any other source
3 shall count against the minimum salary paid to a Federal officeholder holding the seat sought by
4 the candidate.¹⁰ Salary payments made to candidates that do not meet this criteria, *inter alia*, are
5 considered *per se* personal use of campaign funds.¹¹

6 Notwithstanding that the use of campaign funds for a particular expense would be
7 personal use under the regulations, the payment of that expense by any person other than the
8 candidate or the campaign committee is a contribution to the candidate, unless the payment
9 would have been made irrespective of the candidacy.¹² The Act prohibits multicandidate
10 political committees from making contributions to any candidate and her authorized political
11 committee with respect to any election for Federal office which, in the aggregate, exceed
12 \$5,000.¹³ Candidates and political committees are prohibited from knowingly accepting any
13 contribution in violation of the provisions of 52 U.S.C. § 30116.¹⁴

14 Respondents explain that ODP acted as a payroll processing agent for the Shearer
15 Committee and state that the source of all funds for the reported salary payments paid to Shearer

¹⁰ 11 C.F.R. § 113.1(g)(1)(i)(I).

¹¹ *See id.* Additionally, the regulations state that payments of salary from the committee must be made on a pro-rata basis (*i.e.*, a candidate may not receive a whole year's salary if he or she is not a candidate for an entire twelve-month period); incumbent federal officeholders may not receive a salary payment from campaign funds; and the first payment of salary shall be made no sooner than the filing deadline for access to the primary election ballot in the state in which the candidate is running for office. *Id.* Salary payments may continue until the date when the candidate is no longer considered a candidate for office or until the date of the general election or general election runoff. For special elections, payments may continue from the date that the special election is set until the date of the special election. *Id.*

¹² 11 C.F.R. § 113.1(g)(6).

¹³ *See* 52 U.S.C. § 30116(a)(2)(A).

¹⁴ *See* 52 U.S.C. § 30116(f).

1 derive from her principal campaign committee. The Complaint does not allege that the timing or
2 the amount of the payments are impermissible. Absent information suggesting that the Shearer
3 Committee used its funds to make salary payments to Shearer that were made outside of the
4 period during which a candidate may receive a salary from her campaign, were in excess of the
5 salary amount that a candidate may receive from her campaign, or in some other way did not
6 comply with the limitations on candidate salaries,¹⁵ there is not a sufficient basis to conclude that
7 these transactions resulted in the personal use of campaign funds.

8 Further, a review of disclosure reports confirms that the Shearer Committee was
9 disbursing funds to ODP for what appears to be employee salary payments and the timing and
10 amounts correspond with the later payments by ODP. There is no available information that
11 contradicts the Respondents' characterization that the salary processed by ODP originally came
12 from the Shearer Committee. Accordingly, there is no reason to believe that Shearer and the
13 Shearer Committee accepted an excessive contribution from ODP.

14 Therefore, the Commission finds no reason to believe as to the allegation that Shearer
15 and the Shearer Committee violated 52 U.S.C. § 30114(b)(2) by making impermissible or
16 excessive salary payments to Shearer that resulted in personal use of campaign funds or 52
17 U.S.C. § 30116(f) by accepting excessive contributions in the form of salary payments to
18 Shearer.

19 **B. There is Reason to Believe that the Shearer Committee Violated**
20 **52 U.S.C. § 30104(b)(4) by Improperly Reporting Disbursements**
21

22 Political committees must disclose the total amount of all receipts and disbursements to
23 the Commission as part of their regular reporting, and shall report the category of the receipt and

¹⁵ 11 C.F.R. § 113.1(g)(1)(i)(I).

1 purpose of each expenditure.¹⁶ A candidate’s authorized committee must also itemize all
2 disbursements, including operating expenditures that exceed \$200, or aggregate to over \$200
3 when added to other disbursements in the same category, made to the same payee during an
4 election cycle.¹⁷

5 Commission regulations require that payments made “to meet the committee’s operating
6 expenses” must include the name and address of the payee.¹⁸ In other words, if a committee has
7 *itself* incurred an operating expense with a payee, the transactional relationship between the
8 committee and that payee must be disclosed. In a 2013 interpretive rule expressly applying this
9 regulation to the reporting of payments to credit card companies, the Commission explained that
10 a committee itemizing a disbursement to a credit card company “must itemize as a memo entry
11 any transaction with a single vendor charged on the credit card that exceeds the \$200 itemization
12 threshold” in order to itemize the “ultimate payee, as the provider of the goods or services to the
13 political committee” and to reflect that the credit card company was not the provider of those
14 goods and services.¹⁹

15 When a committee (or any other entity) applies for a credit card, it must sign the issuer’s
16 cardholder agreement, which outlines the terms for the extension of credit. When the committee

¹⁶ 52 U.S.C. § 30104(b)(4); 11 C.F.R. §§ 104.3(a)(2)(iii), (vii), (a)(4)(ii), (iii), (b)(1)(ix)(A), (b)(3)(i).

¹⁷ 52 U.S.C. § 30104(b)(5); 11 C.F.R. §§ 104.3(b)(4)(i), (vi), 104.9.

¹⁸ 11 C.F.R. § 104.3(b)(3)(i).

¹⁹ In the rule, the Commission describes a committee’s obligation to report “ultimate payees” in three specific circumstances: (1) reimbursements to individuals who advance personal funds to pay committee expenses; (2) payments to credit card companies; and (3) payments by candidates who use personal funds to pay committee expenses without reimbursement. *See* Interpretive Rule on Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625, 40,626 (Jul. 8, 2013) (“Ultimate Payee Interpretive Rule”). In explaining the rule, “the Commission makes clear that this interpretation is based on long-standing Commission practice and is not making any fundamental changes to its rules or processes.” *Id.*

1 makes a purchase from a merchant or vendor using that credit card, it explicitly consents to a
2 financial transaction with that merchant or vendor. In other words, the committee has privity
3 with both the credit card company and the merchant or vendor with which it transacted. As such,
4 it is required to disclose both obligations on Schedule B.

5 Similarly, when a committee disburses a salary payment to its own employee through an
6 entity acting as a payroll processor, it is fulfilling its *own* obligation to pay that employee, which
7 would have existed irrespective of the payroll processor. Here, reports filed by the Shearer
8 Committee failed to identify the ultimate recipients of salary payments made through ODP
9 acting as a payroll processor. For example, the Shearer committee reported multiple
10 disbursements to ODP identified as “Contribution” and “Contribution — Payroll” on Line 17 of
11 its FEC Form 3 reports under the categorization of “operating expenditures,” but the entries
12 failed to itemize which individuals were the ultimate recipients of the salary payments. During
13 the 2020 election cycle, the Shearer Committee reported two disbursements to ODP identified as
14 “Contribution,” totaling \$5,331.32, and 24 disbursements to ODP identified as “Contribution —
15 Payroll,” totaling \$236,986.21, for a combined total of \$242,317.53. Each disbursement lacked
16 any memo item description identifying individuals who would be paid from the payroll
17 disbursement.²⁰ Thus, anyone seeking to determine the employees of the Shearer Committee

²⁰ See Shearer Comm. 2020 Pre-Primary Report (Mar. 5, 2020) at 78, 86, 87; Shearer Comm. 2020 April Quarterly Report at 62, 67, 68; Shearer Comm. 2020 Pre-Primary Report (April 16, 2020) at 14; Shearer Comm. 2020 July Quarterly Report (July 15, 2020) at 296, 300, 303, 306, 317; Shearer Comm. 2020 October Quarterly Report (Oct. 15, 2020) at 579, 587, 594, 600, 615, 631; Shearer Comm. 2020 Pre-General Report (Oct. 22, 2020) at 131; Shearer Comm. 2020 Post-General Report (Dec. 3, 2020) at 268, 309; Shearer Comm. 2020 Year-End Report (Jan. 31, 2021) at 8,14.

1 and their respective salaries would not be able to find that information, which is especially
2 problematic with respect to a candidate salary paid by his or her campaign committee.²¹

3 When the Shearer Committee identified payments to ODP as “Contribution” and
4 “Contribution — Payroll,” the Shearer Committee did not sufficiently itemize and report the
5 purpose of the expenditures as salary payments from the candidate’s principal campaign
6 committee through ODP to the campaign committee’s employees. By failing to sufficiently
7 identify the salary and payroll disbursements, the Shearer Committee failed to accurately report
8 its expenditures. Accordingly, the Commission finds reason to believe that Alaina Shearer for
9 Congress and Scott M. Hubay, in his official capacity as treasurer violated 52 U.S.C.
10 § 30104(b)(4) by improperly reporting disbursements.

²¹ Regarding the transparency of candidate salaries, the Commission has stated: “In making this decision, the Commission is satisfied that, because all candidate and family members’ salaries will be fully disclosed to the public, those who contribute to the campaign and who support the candidate will be able to voice their approval, or disapproval, of this use of campaign funds.” Personal Use E&J at 76,972–76,973 (Dec. 13, 2002).