



FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA EMAIL

scott@hubaydougherty.com

Scott Hubay
2125 West 41st St.
Cleveland, OH 44113

January 4, 2023

RE: MUR 7792

Dear Mr. Hubay:

On September 17, 2020, the Federal Election Commission notified your client, Desiree Tims, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971 (the "Act"), as amended. On April 26, 2022, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Ms. Tims violated the Act. On November 28, 2020, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's finding(s), is enclosed for your information.

If you have any questions, please contact Don Campbell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark Shonkwiler

Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Gem City Rise PAC **MUR 7792**
(f/k/a Friends of Desiree Tims)¹ and
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 \$247,033.36 in salary payments to employees of the principal campaign committee of 2020 Ohio congressional candidate Desiree Tims as state party payroll payments by the Ohio Democratic Party (“ODP”). The complaint alleges that what appeared to be ODP salary payments to candidate Tims were an impermissible personal use of campaign funds and that ODP misreported its apparent subsidy of the Tims campaign as state party payroll expenses.² The Tims Committee Response explains that Tims’s campaign committee transferred funds to ODP, which provided a payroll processing service for employees of this federal candidate campaign committee. The Tims 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 Tims, and Gem City Rise PAC (f/k/a Friends of Desiree Tims) and Scott M. Hubay in his official capacity as treasurer (the “Tims

¹ Following the 2020 election, Friends of Desiree Tims has converted to a PAC, and changed its name to Gem City Rise PAC; *see* Amended Statement of Org. (Jan. 12, 2021). <https://docquery.fec.gov/pdf/378/202101129398406378/202101129398406378.pdf>.

² Compl. at 2 (Sept. 10, 2020). Tims filed her Statement of Candidacy for the U.S. House of Representatives in Ohio’s 10th District on November 18, 2019, and the Tims Committee filed its Statement of Organization on July 25, 2019; she lost in the general election on November 3, 2020.

1 Committee”) violated 52 U.S.C. § 30114(b)(2) by making impermissible candidate salary
2 payments or 52 U.S.C. § 30116(f) by accepting excessive contributions in the form of salary
3 payments to Tims. However, the Commission finds reason to believe that the Tims Committee
4 violated 52 U.S.C. § 30104(b)(4) by improperly reporting the purpose of its disbursements to
5 ODP and failing to report the resulting salary payments to specific campaign committee
6 employees.

7 **II. FACTUAL AND LEGAL ANALYSIS**

8 **A. Background**

9 ODP is a state committee of the Democratic Party.³ Desiree Tims was a 2020 candidate
10 for the U.S. House of Representatives in Ohio’s 10th Congressional District. The Tims
11 Committee was her principal campaign committee.

12 The complaint alleges that ODP, Tims, and the Tims Committee (collectively,
13 “Respondents”) engaged “in an unlawful scheme to violate the federal campaign finance laws,”
14 when ODP paid a salary to Tims in 2019-2020.⁴ The complaint alleges that because these
15 payroll-related payments came from ODP instead of the Tims Committee, the disbursements
16 constitute a personal use of campaign funds.⁵

³ 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.

⁴ 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 multiple Financial Disclosure Reports that Tims filed with the Clerk of the U.S. House of Representatives state that Tims received a stipend/salary from a single entity during the campaign, \$17,000 total from the Tims Committee. *Id.*; *see also* Desiree Tims U.S. House of Representatives 2019 Financial Disclosure Report (Dec. 27, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2019/10032332.pdf, and Desiree Tims U.S. House of Representatives 2020 Financial Disclosure Report (Aug. 13, 2020), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2020/10035961.pdf.

⁵ Compl. at 6.

1 The response filed on behalf of the Tims Committee (the “Candidate Response”), asserts
 2 that the candidate campaign committee provided the funding for all “payroll” payments made to
 3 Tims, as reported by ODP, and that ODP was merely an intermediary providing a service as a
 4 payroll processor.⁶ The Candidate Response states that the campaign sent funds for payroll to
 5 ODP’s federal account and ODP then processed payroll for the Tims Committee.⁷ The
 6 Candidate Response does not address any of the alleged reporting issues.

7 **B. Legal Analysis**

8 **1. There is No Reason to Believe the Salary Payments to Tims were an** 9 **Impermissible Personal Use of Campaign Funds or Constituted** 10 **Excessive Contributions to the Tims Committee**

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

⁶ Candidate Resp. at 1. (Nov. 3, 2020).

⁷ *Id.* In reports filed with the Commission, the Tims 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.

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

⁹ 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”).

¹⁰ 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

1 minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks
2 or the earned income that the candidate received during the year prior to becoming a candidate,
3 but any earned income that a candidate receives from salaries or wages from any other source
4 shall count against the minimum salary paid to a Federal officeholder holding the seat sought by
5 the candidate.¹¹ Salary payments made to candidates that do not meet this criteria, *inter alia*, are
6 considered *per se* personal use of campaign funds.¹²

7 Notwithstanding that the use of campaign funds for a particular expense would be
8 personal use under the regulations, the payment of that expense by any person other than the
9 candidate or the campaign committee is a contribution to the candidate, unless the payment
10 would have been made irrespective of the candidacy.¹³ The Act prohibits multicandidate
11 political committees from making contributions to any candidate and her authorized political
12 committee with respect to any election for Federal office which, in the aggregate, exceed
13 \$5,000.¹⁴ Candidates and political committees are prohibited from knowingly accepting any
14 contribution in violation of the provisions of 52 U.S.C. § 30116.¹⁵

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).

¹¹ 11 C.F.R. § 113.1(g)(1)(i)(I).

¹² *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.*

¹³ 11 C.F.R. § 113.1(g)(6).

¹⁴ *See* 52 U.S.C. § 30116(a)(2)(A).

¹⁵ 52 U.S.C. § 30116(f).

1 Respondents explain that ODP acted as a payroll processing agent for the Tims
2 Committee and state that the source of all funds for the reported salary payments paid to Tims
3 derive from her principal campaign committee. The Complaint does not allege that the timing or
4 the amount of the payments are impermissible. Absent information suggesting that the Tims
5 Committee used its funds to make salary payments to Tims that were made outside of the period
6 during which a candidate may receive a salary from her campaign, were in excess of the salary
7 amount that a candidate may receive from her campaign, or in some other way did not comply
8 with the limitations on candidate salaries,¹⁶ there is not a sufficient basis to conclude that these
9 transactions resulted in the personal use of campaign funds.

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

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

¹⁶ 11 C.F.R. § 113.1(g)(1)(i)(I).

1 **B. There is Reason to Believe that the Tims Committee Violated**
2 **52 U.S.C. § 30104(b)(4) by Improperly Reporting Disbursements**

3
4 Political committees must disclose the total amount of all receipts and disbursements to
5 the Commission as part of their regular reporting, and shall report the category of the receipt and
6 purpose of each expenditure.¹⁷ A candidate’s authorized committee must also itemize all
7 disbursements, including operating expenditures that exceed \$200, or aggregate to over \$200
8 when added to other disbursements in the same category, made to the same payee during an
9 election cycle.¹⁸

10 Commission regulations require that payments made “to meet the committee’s operating
11 expenses” must include the name and address of the payee.¹⁹ In other words, if a committee has
12 itself incurred an operating expense with a payee, the transactional relationship between the
13 committee and that payee must be disclosed. In a 2013 interpretive rule expressly applying this
14 regulation to the reporting of payments to credit card companies, the Commission explained that
15 a committee itemizing a disbursement to a credit card company “must itemize as a memo entry
16 any transaction with a single vendor charged on the credit card that exceeds the \$200 itemization
17 threshold” in order to itemize the “ultimate payee, as the provider of the goods or services to the
18 political committee” and to reflect that the credit card company was not the provider of those
19 goods and services.²⁰

¹⁷ 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).

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

¹⁹ 11 C.F.R. § 104.3(b)(3)(i).

²⁰ 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

1 When a committee (or any other entity) applies for a credit card, it must sign the issuer’s
2 cardholder agreement, which outlines the terms for the extension of credit. When the committee
3 makes a purchase from a merchant or vendor using that credit card, it explicitly consents to a
4 financial transaction with that merchant or vendor. In other words, the committee has privity
5 with both the credit card company and the merchant or vendor with which it transacted. As such,
6 it is required to disclose both obligations on Schedule B.

7 Similarly, when a committee disburses a salary payment to its own employee through an
8 entity acting as a payroll processor, it is fulfilling its *own* obligation to pay that employee, which
9 would have existed irrespective of the payroll processor. Here, reports filed by the Tims
10 Committee failed to identify the ultimate recipients of salary payments made through ODP
11 acting as a payroll processor. For example, the Tims committee reported multiple disbursements
12 to ODP identified as “Contribution” and “Contribution — Payroll” on Line 17 of its FEC Form 3
13 reports under the categorization of “operating expenditures,” but the entries failed to itemize
14 which individuals were the ultimate recipients of the salary payments. During the 2020 election
15 cycle, the Tims Committee reported 22 disbursements to ODP identified as “Contribution,”
16 totaling \$94,662.09, and 12 disbursements to ODP identified as “Contribution — Payroll,”
17 totaling \$152,371.27, for a combined total of \$247,033.36. Each disbursement lacked any memo
18 item description identifying individuals who would be paid from the payroll disbursement.²¹

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.*

²¹ See Tims Comm. 2020 July Quarterly (July 15, 2020) at 393, 397, 402, 406, 415; Tims Comm. Second Amended 2020 October Quarterly (Mar. 11, 2021) at 1079, 1091, 1101, 1110, 1124, 1126, 1130, 1135; Tims Comm. 2020 Year-End (Jan. 31, 2021) at 9, 12. In addition to its disbursements to ODP marked ‘Contribution’ and ‘Contribution - Payroll,’ the Tims Committee’s reports indicate that it engaged a second payroll processor in 2020, and properly reported those transactions. Specifically, the Tims Committee reported 104 disbursements made to “Gusto” for the purpose of “Payroll” between October 20, 2020, and December 16, 2020, totaling \$19,348.75. See Tims Comm. Amended 2020 Post-General (Jan. 31, 2021) at 599-613, 623-637, 654-675; Tims Comm. 2020 Year-End at 8, 10, 11, 15. Gusto is an online service that facilitates payroll and benefits for small businesses. See

1 Thus, anyone seeking to determine the employees of the Tims Committee and their respective
2 salaries would not be able to find that information, which is especially problematic with respect
3 to a candidate salary paid by his or her campaign committee.²²

4 When the Tims Committee identified payments to ODP as “Contribution” and
5 “Contribution — Payroll,” the Tims Committee did not sufficiently itemize and report the
6 purpose of the expenditures as salary payments from the candidate’s principal campaign
7 committee through ODP to the campaign committee’s employees. By failing to sufficiently
8 identify the salary and payroll disbursements, the Tims Committee failed to accurately report its
9 expenditures. Accordingly, the Commission finds reason to believe that Gem City Rise PAC
10 (f/k/a Friends of Desiree Tims) and Scott M. Hubay in his official capacity as treasurer violated
11 52 U.S.C. § 30104(b)(4) by improperly reporting disbursements.

<https://gusto.com/product/payroll/online>. The Tims Committee disbursements to Gusto corresponded to Memo Items for 58 disbursements totaling \$15,011.25 to 25 separate individuals with the description of “Payroll,” made on Oct. 20, 2020, Oct. 23, 2020, Oct. 28, 2020, and Nov. 18, 2020.

²² 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).