

## RULING (2022-1) ON COMPLAINTS BY CHAD HANSON AND AARON MAIR CONCERNING THE BOARD'S ENDORSEMENT OF NOMINATING COMMITTEE CANDIDATES

### Factual Background.

On January 19, a revised agenda was sent to Board directors containing a resolution calling for the endorsement of the six candidates proposed by the Nominating Committee. The proposed resolution states in part that,

*The Board of Directors hereby endorses the six candidates nominated by the Nominating Committee: Shruti Bhatnagar, Cheyenne Branscum, Allison Chin, Brian Gomez, Cynthia Hoyle and Herve Jean-Baptiste and urges Sierra Club members to vote for five of these six candidates when filling out their ballot.*

At its regularly scheduled Board meeting on January 20, the resolution was duly moved, seconded and after discussion was adopted by a vote of 11-3 with one abstention.

This action by the Board was unusual, if not unprecedented. As far as we could determine, no Club Board has endorsed candidates for at least the last 20 years. Individual Board members have historically endorsed candidates and, according to long-time Board member Richard Cellarius, in at least one previous election all Board members endorsed candidates.

On January 21, Chad Hanson filed a complaint with the Inspectors of Election concerning the Board's decision to endorse for the Board election the candidates set forth by Nominating Committee. On that same date, Aaron Mair filed, on behalf of himself and the other three petition candidates, a virtually identical complaint with the Inspectors. We have consolidated these two complaints from Messrs. Hanson and Mair (the "Complainants") and this Ruling covers both matters.

### Analysis of Complainants' Arguments.

The Complainants refer to California Corporations Code and the Club's Standing Rules, both of which require that the Inspectors of Election must assure that Club's election of Directors be conducted "fairly". In particular, California Corporations Code Section 5615(b) states in part that the Inspectors shall, "do such acts as may be proper to conduct the election vote with fairness to all members." Further, SR 5.6.2 states that, "decisions by the Inspectors shall be based on the Club's Bylaws and Standing Rules in conformance with California law to ensure a fair election."

What is "fair" and how is it to be determined? This analysis is not done in a vacuum. Rather, it is to be determined in the context of applicable law and our Bylaws and Standing Rules. For example, one could argue that it is not fair that one candidate has the wealth to spend lavishly in support of his or her campaign while another of more modest means cannot. Do the Inspectors invalidate the election because it was unfair?

They do not, because SR 5.6.1(j) contemplates and allows for spending inequities but requires each candidate to disclose his or her campaign spending. As a result, when determining whether an action is fair, the Inspectors do so while taking into account our Bylaws and Standing Rules, and applicable law.

Now we turn to each of the arguments made by the Complainants that the Board's action in endorsing six candidates was unfair to the four others.

1. The Complainants argue that the endorsement of candidates was itself unfair because it creates one group of favored candidates over another, disfavored group:

*The Board is the governing body of the Sierra Club and an endorsement of one group of candidates over another by the Board signals organization-wide approval of one group of candidates and rejection by the organization of the other group of candidates. This, on its face, creates an unfair election.*

Both California Law and our Standing Rules permit the Board to endorse candidates. California Corporation Code Section 5526 contemplates that boards have the authority to endorse: "Without authorization of the board, no corporate funds may be expended to support a nominee for director after there are more people nominated for director than can be elected." Standing Rule 5.6.1(a)(iii) contains parallel wording which also acknowledges the Board's authority to endorse:

*Without authorization by the Board by resolution or except as provided in the Bylaws and Standing Rules, no Club funds or other resources, including those of Club entities, shall be used to support or oppose any candidate for Director.*

Further, the Club's Guidelines which allow Chapters to make endorsements of candidates states in part that, "Chapters, the Sierra Student Coalition, and the Board are the only Club entities that can endorse candidates."

An endorsement, by its very nature, signals an approval of one group of candidates over another. That, however, does not make the endorsement unfair, since California law and our Standing Rules permit Board endorsements. Further, Complainants concede that individual Board members, Chapters and the Sierra Student Coalition can properly endorse candidates. These actions also signal an approval of one group of candidates over another, the only difference being the reach of the endorsement.

While not critical to our ruling, we also note that the endorsement resolution does not state that the "Sierra Club endorses", but rather that the "Board of Directors endorse". This more measured language is less likely to create the impression that there is an, "organization-wide approval of one group of candidates" as the Complainants allege, but rather the decision by a majority of a 15 member Board.

In ruling that the Board has the right to endorse, we recognize that its publication of the endorsement must be done fairly. For example, we cannot conceive of any instance where publishing an endorsement on the cover of *Sierra* would ever be fair. Publication of an endorsement decision must be done carefully in a measured manner.

In the present case, the Board resolution calls for the publication of the endorsement in two places in the ballot materials; in the President's cover letter to voting members, and in the memo describing the voting process. We do not believe the placement of the same statement in two places in the ballot materials is appropriate or warranted. When Chapters make endorsement decisions, they are permitted to place their statement only in the newsletter and website of that chapter and its groups. Because of

this need to act with caution, the Inspectors believe that the endorsement statement should only appear in the President's letter in the same font size and style as the rest of the letter.

Because California Law and our Standing Rules both permit the endorsement of candidates, we do not believe this action is unfair, but we rule that the publication of the endorsement decision can only appear in the President's cover letter and not also in the ballot memo.

2. The Complainants state that the Board action calls for the expenditure of Club resources to publish a statement with the ballot materials containing its endorsement decision and does not give petition candidates an opportunity to to have its own statement included in the materials telling members why voting for them would be better:

*The Board resolution commits the Sierra Club to expend significant organizational resources to publish [the endorsement] statement... [without giving] the petition candidates an equal opportunity in the election to have their own statement, telling members why voting for the four petition candidates is better, published and included, equally, in the ballot materials sent to members.*

No significant funds or organizational resources will be spent to include an extra sentence in the ballot statement and cover letter. Funds and time will need to be spent to print the ballot materials whether the sentence will be in the materials or not.

With regard to the second portion of this argument, it would appear the Complainants are asking for a chance to advocate for the petitioners' candidacy in a manner that is greater than what the endorsement statement provides. Again, the sentence which the resolution proposes to be inserted in the ballot materials simply states that the Board has endorsed six candidates and urges members to vote for five of the six. It does not describe the qualifications of these candidates or the reasons why voting for these candidates would be better than voting for the other four candidates. Yet, it would appear that is what the Complainants are asking for with regard to the petition candidates. Since we have ruled that the endorsement decision was a valid exercise of the Board's authority, we rule this argument is equally without merit.

3. The Complainants next argue that the preamble to the Board endorsement resolution questions the motives and integrity of the petition candidates:

*The Jan. 20th Board resolution includes, in the first paragraph, a statement that implicitly questions the motives and integrity of the petition candidates, by implying that they are motivated by self-interest rather than interest in the good of the Sierra Club.*

The Board resolution does not mention the petition candidates and only sets forth the Nominating Committee's process and the candidates who were nominated. Failure to mention the petition candidates is not an inference that they are unqualified or impugn their integrity. The Board resolution is thus not unfair in this regard.

4. The Complainants allege that it was unfair that the notice of the January 20<sup>th</sup> Board resolution did not come until petition candidates' ballot statements were due, thus depriving them of the opportunity to respond to the resolution in their ballot statements.

*The notice about the Jan. 20th Board resolution did not come until immediately after the petition candidates' ballot statements were due, which means the timing deprived us of the opportunity to respond to the resolution in their ballot statements. This too creates an unfair election.*

Bylaw 5.6 provides:

*At least four (4) weeks before the date set for counting the ballots, a ballot containing the names of the nominees, in the order presented by the Nominating Committee, shall be mailed to each member of the Club eligible to vote. The ballot shall be accompanied by the statement of each nominee. If no statement has been received from a nominee, it shall be so indicated, but the nominee's name shall remain on the ballot.*

Standing Rule 5.6.1(b) provides:

*(i) A statement from each nominee shall be distributed with the ballot mailed to each Regular or Life member. Statements and photographs, if they are to be included in the ballot materials, shall be delivered to Sierra Club's Executive Office by noon Pacific time on a date set by the Nominating Committee, not more than two weeks after the close of nominations.*

*(ii) The Nominating Committee shall prescribe the form of the statements, including the number of words and of paragraphs or indentations, the use of bullets or other printer's marks and specific information (for example, length of membership, offices held and other experience in Sierra Club) that the committee may require of all candidates. Candidates must submit with their statements evidence that each listed endorser has agreed to be so listed.*

....

*(iv) The introductory material that accompanies the candidates' statements for the election of Directors shall indicate whether the candidate was nominated by the Nominating Committee or by petition. There shall also be indication after each candidate's statement and/or under each candidate's photograph, as well as on the ballot, as to whether the candidate was nominated by the Nominating Committee or by petition.*

Other than these provisions, the bylaws and standing rules do not place limits on what is mailed to the members in the ballot packet. The guidelines for chapter and group endorsements do allow the petition candidates to include such endorsements in the ballot packet -- "At their discretion, candidates also may include such endorsements in their statements in the ballot pamphlet and other materials prepared at their expense or those of their supporters. The Ballot Statement Review Committee will require

candidates to submit with their statements evidence that the chapter has made the endorsement in question."

SR 5.6.1(c)(i) provides:

*No articles or messages by or about individual candidates shall be published in SIERRA, Sierra Club newsletters, web pages, or other Sierra Club publications between the close of nominations and the date set for counting Sierra Club ballots, except (A) for routine articles or messages (defined below), or (B) if all candidates are given at least seven days written notice, through the Sierra Club's Executive Office, to submit an article or message of equal length to be published with equal prominence in the same publication.*

The close of nominations is the second Wednesday in January, so for this year it was January 12, 2022. (SR 5.2.1). Therefore no articles or messages about candidates can be published in Sierra Club "publications" at this time. However, since the ballot packets are sent out after the close of nominations, and since the rules clearly allow for "statements" about candidates in the ballot packets, clearly the rules do not contemplate that the ballot packets are "publications" subject to this rule.

Similarly, there is no time cutoff for endorsements in general, and the Bylaws and Standing Rules, read as a whole, in fact appear to anticipate endorsements being issued after the close of nominations and after the ballot packets are sent out.

Note that SR 5.6.1(h) allows requests for access to the member mailing list up to 40 days before the date set for counting ballots; and if any such request is made, another request (presumably for rebuttal) can be made up to 30 days prior to the ballot-counting date. Here, the ballot-counting date was set by the Board for April 27, 2022. Therefore the deadline for member mailings is March 18; and if anyone makes such a mailing request, additional requests can be made by March 28.

With regard to the Complainants' argument here, after reviewing the Bylaws, Standing Rules, the guidelines for endorsements, and the California Corporation Statute, we find no grounds for the timing complaint. There is no requirement that candidates to be provided information about who the Board or its members are going to endorse *before* the ballot packets go out. This is not fundamentally "unfair," because endorsements continue to be allowed after the ballot packets are sent out; and the mailing list is available to the candidates for mailing information to members until March 18, 2022 (potentially until March 28).

Further, we find that the the timing of the Board resolution was not intentionally set to disadvantage the petition candidates. Petitioners had until the close of nominations (January 12) to submit petitions. The Club then verifies and counts the petitions and it was on January 14 when it was determined that each of the four petitioners had submitted the requisite number of petitions. It would have been unnecessary and superfluous to have the Board adopt a resolution endorsing the Nominating Committee candidates if none of the petitioners had qualified. So, the resolution was introduced at the next Board meeting (six days later on January 20) once it was determined that the petitioners had qualified.

5. Finally, Complainant Mair alleged that during the Board discussion of the resolution, several Board members openly electioneered against the petition candidates, thus creating an unfair election:

*During the Board discussion prior to the passage of the resolution, several Board members openly advocated voting for the NomCom candidates, and just as openly electioneered against the petition candidates. This included numerous false statements about our positions and personal attacks (too many to list here), and this was done for the better part of an hour on an official Sierra Club list (we see a Zoom call as being fundamentally the same as a Sierra Club listserv) in open session while several dozen Sierra Club leaders listened (and those leaders were not allowed to ask questions or make any comments). Once again, this created an unfair election.*

This argument has three facets: One, that wrongful electioneering took place during the meeting, two, that member comments were not allowed and three that the Board meeting was the same as the use of a Club listserv.

With regard to the electioneering argument, the Complainants' logic seems to be that any entity considering endorsement should not be permitted to discuss candidates or slates being evaluated for endorsement, and to assert the reasons that participants support or oppose endorsements for any candidates. Applied consistently, this would mean that Chapters also cannot discuss candidates during endorsement discussions; after all, those meetings are equally as "public" as Board of Directors meetings, and they equally constitute use of Club resources. If this argument were sustained, it would mean no more endorsements from entities, because this logic would prevent any open-session discussion that could result in an endorsement. We find this argument to be without merit.

Second, that members were not allowed to speak at the meeting, we can find no guidelines in the bylaws or standing rules that directly address this issue. The bylaws state that the Board meetings will be "conducted according to Robert's Rules of Order, Revised, or such other rules of order as are adopted by the meeting and are consistent with the Bylaws of Sierra Club, these Standing Rules, and the Corporation Law."

We found no provisions in the Corporations Code that requires the Board to allow members or candidates to speak at Board meetings. *See* Corp. Code 5510-5517 (meetings and voting); *id.* 5520-5527. Further, Robert's Rules provides that public comment is not required during a public meeting.

With regard to the argument that the Board meeting via a Zoom call is the equivalent of the use of a Club listserv, we find no support for that. A Board meeting is a specific event, with procedure dictated by multiple state statutes and the Club's bylaws and standing rules, as well as Robert's Rules of Order (see above). If it were in person, it would be nonsensical to argue that the Board members' statements were equivalent to posting on a listserv; and it is just as nonsensical to make that analogy here, simply because meetings have by and large moved to an online format. We find this argument without merit.

Conclusion.

We hereby rule that the Board has the authority to endorse candidates for the Board election and the resolution and conduct of the meeting where the endorsement occurred was not improper.

It is difficult to gauge the impact endorsements have on elections in general. It is obviously even more difficult to gauge the impact the Board's endorsement will have in the upcoming election. While the impact an endorsement has on a candidate's success is difficult to determine, there can be no argument that an endorsement carries some weight and such actions, especially by the Board, should be done carefully and in a measured way.

Because of this need to act with caution in publishing an endorsement decision, we do not believe the placement of the same statement in two places in the ballot materials is appropriate. Because of this need to act with care, the Inspectors believe that the endorsement statement should only appear in the President's letter (in the same font size and style as the rest of the letter) but not also in the ballot memo, and we so rule.

Steve Krieg,  
Chief Inspector of Elections

Alan Carlton,  
Associate Inspector of Elections

Marianne Dugan,  
Associate Inspector of Election