UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5012

RICHARD J. ORLOSKI,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE FEDERAL ELECTION COMMISSION

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ISSUE PRESENTED

Whether the district court properly concluded that the Federal Election Commission's dismissal of Orloski's administrative complaint was not contrary to law.

RULE 8(b) STATEMENT

This case was previously before the United States District Court for the District of Columbia on Mr. Orloski's petition to review the Federal Election Commission's ("FEC" or "Commission") decision to dismiss Mr. Orkloski's first administrative complaint which had been filed September 30, 1982. Orloski v. FEC, No. 83-0026. The parties at that time stipulated to the Court's granting

summary judgment in favor of the Commission, with leave for Mr. Orloski to file a new administrative complaint to bring new facts to the Commission's attention (App. 75a-76a). The instant case involves Mr. Orloski's petition to review the Commission's dismissal of his second administrative complaint, which was filed June 11, 1983.

COUNTERSTATEMENT OF THE CASE

This is an appeal from a final judgment of the United States District Court for the District of Columbia upholding a determination by the Federal Election Commission to dismiss an administrative complaint filed with the Commission by Richard J. Orloski. This court has jurisdiction of the appeal pursuant to 2 U.S.C. § 437g(a)(8) and (9) and 28 U.S.C. § 1291.[1/]

A. The Commission Proceedings

On June 11, 1983, Richard Orloski filed an administrative complaint with the Commission, pursuant to 2 U.S.C. § 437g (App. 4a-17a).[2/] Mr. Orloski's administrative complaint

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1/ It should be noted that Mr. Orloski's brief contains no Rule 8(b) statement, no references to the appendix in support of its factual assertions, and no indication of cases principally relied upon. In addition, his brief has a red cover rather than blue as required for appellants. Although he is pursuing this action pro se, Mr. Orloski is a practicing attorney.

2/ 2 U.S.C. § 437g(a)(1), a section of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et. seq. ("FECA" or "the Act"), permits any person to file a signed, sworn administrative complaint with the Commission. The Commission, upon the affirmative vote of four Commissioners finding reason to believe a violation has ocurred, is authorized to conduct an investigation to determine if there is probable cause to believe a violation has occurred. 2 U.S.C. § 437g(a)(2)-(4). If it does not find reason to believe a violation occurred, the Commission will dismiss the administrative complaint.

concerned a senior citizens picnic co-sponsored by Congressman Don Ritter and the Lehigh Valley Senior Citizens Committee ("the Senior Citizens Committee"), which was held more than a month before the 1982 general election, in which Orloski was Ritter's Democratic opponent.[3/] HGF Management Corporation and Newhart Foods, Inc., provided free food and drink for the senior citizens who attended the picnic and McCormack Equipment, Inc., provided free chartered bus service for the senior citizens to and from the picnic. Orloski alleged that the picnic was a political rally in support of Congressman Ritter's re-election campaign (App. 5a, 11a-12a) and that therefore the food and services donated by the corporations were political contributions that violated 2 U.S.C. § 441b(a). Orloski also claimed that the Senior Citizens Committee was a political committee which had failed to register as required by 2 U.S.C. § 433. As required by 2 U.S.C. § 437g(a)(1), the Commission notified the respondents of the filing of the complaint, and they submitted a memorandum with supporting documentary evidence to demonstrate why the Commission should not proceed against them (App. 22a-61a).

The Commission's General Counsel submitted two reports to the Commission (App. 62a-70a, 72a-73a), which discussed Orloski's

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3/ The Senior Citizens Committee was one of several issue-oriented, nonpartisan advisory groups established by Congressman Ritter to assist him in his capacity as congressman. The Committee, formed in 1979, periodically met with the congressman to discuss the problems of the elderly (App. 23a-24a). It was composed of individuals involved in a variety of organizations and activities concerning the elderly, and there was no requirement of party affiliation to join the committee (App. 34a-38a).

allegations and concluded that, under applicable precedent, the picnic was not a political campaign event because there were no communications at the picnic expressly advocating the election of Congressman Ritter or the defeat of Mr. Orloski, and there was no solicitation or acceptance of campaign contributions for any federal candidate. Instead, the picnic appeared to be an event held to enable an incumbent congressman to communicate with his constituents with respect to issues of public importance. Corporate contributions to such an event are not considered to be in connection with a federal election, and thus there was no reason to believe that the Ritter Committee or the corporations had violated 2 U.S.C. § 441b. Since there was no other evidence to indicate that the Senior Citizens Committee had made any political expenditures, there was no reason to believe the Senior Citizens Committee was a political committee required to register with the Commission under 2 U.S.C. § 433. Accordingly, the General Counsel recommended that the Commission find no reason to believe that any violations of the Act had occurred as alleged in Orloski's complaint. (App. 67a-70a, 72a-73a.) The Commission adopted the General Counsel's recommendations and the complaint was dismissed (App. 71a, 74a).

B. The District Court Proceedings

Mr. Orloski petitioned the district court under 2 U.S.C. § 437g(a)(8) for review of the Commission's decision. Cross motions for summary judgment were filed, and on December 6, 1984,

the district court issued its memorandum opinion and order (App. 77a-88a). The court noted that "[b]oth sides agree that the standard to be applied by this Court in reviewing the FEC's decision not to investigate Orloski's complaint is whether the Commission's decision was arbitrary, capricious, or an abuse of the Commission's discretion ... This is an extremely deferential standard which requires affirmance if a rational basis for the agency's decision is shown." (App. 79a-80a, citations omitted). After analyzing the facts and circumstances of this case and the criteria established by the Commission for determining when an event is campaign related, Judge Gasch held that the Commission's determination was not arbitrary or capricious. The Commission's motion for summary judgment was granted and Mr. Orloski's motion for summary judgment was denied (App. 88a).

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE COMMISSION'S DISMISSAL OF ORLOSKI'S ADMINISTRATIVE COMPLAINT WAS NOT CONTRARY TO LAW.

A. The Standard of Review

The standard for judicial review of the Commission's dismissal of an administrative complaint is contained in the provision authorizing the district court to review such action: "[T]he court may declare that the dismissal of the complaint ...

is contrary to law, ..." 2 U.S.C. § 437g(a)(8)(C).[4/] In order to establish that the Commission acted contrary to law, a complainant must show that the dismissal of his or her administrative complaint was arbitrary and capricious, or an abuse of discretion. FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 31 (1981); In re Carter-Mondale Reelection Committee, 642 F.2d 538, 542 (D.C. Cir. 1980); In re Federal Election Campaign Act Litigation, 474 F. Supp. 1044, 1046 (D.D.C. 1979); International Association of Machinists v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶9144, at 51,105 (D.D.C. 1980), aff'd mem., 672 F.2d 894 (D.C. Cir. 1981) (en banc), cert. denied, 456 U.S. 974 (1982).[5/]

4/ Section 437g(a)(8) provides, in relevant part:

> (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1) ... may file a petition with the United States District Court for the District of Columbia.
>
> (B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.
>
> (C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint ... is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

5/ While the Commission does not expressly adopt the General Counsel's report in making its determination, the Supreme Court has held that the General Counsel's Report provides the appropriate basis for reviewing a Commission decision. FEC v. Democratic Senatorial Campaign Committee, 454 U.S. at 38 n. 19.

"In determining whether an agency's action is arbitrary or an abuse of discretion, a reviewing court must assume that the agency acted properly ... and it must refrain from substituting its judgment for that of the agency." ITT World Communications, Inc. v. FCC, 725 F.2d 732, 742 (D.C. Cir. 1984). "The burden of overcoming this presumption is upon the party challenging the agency action." Environmental Defense Fund v. Costle, 657 F.2d 275, 283, n. 28 (D.C. Cir. 1981). Accord, Certified Color Manufacturers Ass'n v. Mathews, 543 F.2d 284, 293-294 (D.C. Cir. 1976); Maryland-National Capital Park And Planning Commission v. Lynn, 514 F.2d 829, 834 (D.C. Cir. 1975). As long as the agency has considered the relevant factors, "[t]he standard mandates judicial affirmance if a rational basis for the agency's decision is presented ... even though [the court] might otherwise disagree...." Environmental Defense Fund v. Costle, 657 F.2d at 283.

Further, when a court reviews an agency's construction of the statute which it administers, the court's role is not to "simply impose its own construction on the statute," but rather, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron v. Natural Resources Defense Council, 104 S. Ct. 2778, 2782 (1984). In fact, the Supreme Court has specifically held that in reviewing the Commission's construction of the Act under 2 U.S.C. § 437g(a)(8), the court owes the Commission's approach substantial deference:

> [T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. . . . To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. at 39 (citations omitted). See also, Chevron v. Natural Resources Defense Council, 104 S. Ct. at 2782 ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"); Chemical Manufacturers Ass'n v. Natural Resources Defense Council, 105 S. Ct. 1102, 1108 (1985). As this court has held, "[w]hen an agency interprets a statute which it has been charged with administering, the agency's interpretation must be accepted ... unless its conclusion is inconsistent with obvious congressional intent." ITT World Communications, Inc. v. FCC, 725 F.2d at 741 (citations omitted). Accord, Rettig v. Pension Benefit Guarantee Corp., 744 F.2d 133, 150 (D.C. Cir. 1984).

In sum, the court's inquiry here is a narrow one: the Commission's decision not to pursue an investigation should not be disturbed unless the court can discern no rational or defensible basis for that determination. FEC v. Democratic Senatorial Campaign Committee, 454 U.S. at 39; In re Carter-Mondale Reelection Committee, 642 F.2d at 545; International Association of Machinists v. FEC, 2 Fed. Elec. Camp. Fin. Guide at 51,105.

B. The Commission Has Properly Construed The Act Not To Apply To An Incumbent's Non-Campaign Appearances As An Office Holder

It is undisputed in this case that these corporations provided free goods or services to the Senior Citizens picnic. However, the Act does not prohibit corporate support or sponsorship of every event at which a Congressman appears; only corporate contributions and expenditures that are "in connection with" a federal election are prohibited by 2 U.S.C. § 441b(a).[6/] Therefore, as the district court concluded, "[o]nly if ... the picnic is characterized as a campaign event would Orloski's charges have any significance since the Federal Election Campaign Act does not prohibit any of the activities in question if they were associated with a nonpolitical event" (App. 80a.)[7/]

The Commission has long recognized that incumbent congressmen have a responsibility as a part of their job as representative, whether or not they are candidates for reelection, to communicate with their constituents about issues of public concern. There is no indication in the legislative history that

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6/ 2 U.S.C. § 441b(a) makes it unlawful for any corporation to make a contribution or expenditure in connection with a federal election, or for any candidate or political committee to receive such a contribution. See 2 U.S.C. § 431(2), (8) and (9), respectively, for the definitions of candidate, contribution, and expenditure.

7/ The Senior Citizens Committee would not be a political committee required to register with the Commission under 2 U.S.C. § 433 unless it received or expended at least $1000 for the purpose of influencing a federal election. See 2 U.S.C. § 431(4)(A) which defines the term political committee. 2 U.S.C. § 433(a) requires a political committee to file a Statement of Organization with the FEC within 10 days of becoming such a committee.

the Act was intended to interfere with a congressman continuing to communicate with constituents in his capacity as a representative during a reelection campaign. Accordingly, while anything an incumbent congressman does might have the potential to affect his reelection chances, the Commission has determined that the Act was not intended to regulate appearances by incumbent congressmen in the role of office holder rather than candidate.

As the district court recognized, "[t]he Commission has established two criteria" for determining whether an event at which an incumbent appears is regulated by the Act (App. 80a). "[A]n event is not considered campaign related unless: 1) there are communications at the event that expressly advocate the election of the candidate or defeat of his opponent; or 2) contributions to the candidate's campaign are solicited or accepted at the event" (App. 80a-81a). See Advisory Opinion ("AO") 1980-89, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5537; AO 1980-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5474; AO 1980-22, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶5479.[8/] In AO 1980-89, the Commission specifically found that if a Congressman sponsors an event in connection with his or her duties as a federal officeholder rather than to advocate his reelection, then donations to help put on the event would not be considered contributions or expenditures under the Act.

8/ The Act requires the Commission to issue Advisory Opinions construing the application of the Act in response to any proper request. See 2 U.S.C. § 437f.

The district court properly concluded that this construction of the statute by the Commission was a permissible one. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the state." Chevron v. Natural Resources Defense Council, 104 S. Ct. at 2782.

> If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. at 2783, quoting United States v. Shimer, 367 U.S. 374, 383 (1961).

Mr. Orloski has pointed to nothing in the Act or its legislative history indicating that the Commission's application of the Act's restrictions on campaign financing so as not to interfere with the noncampaign activities of federal officials is contrary to an expressed intention of Congress.[9/] To the

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9/ Mr. Orloski contends (Br. 17-19) that the Commission is precluded from determining that a corporate donation to a noncampaign event is lawful if the officers of the corporation held a subjective belief that the donation might further a candidate's election chances. Such a subjective standard would not only be impossible to administer, but could subject the recipient of the donation to sanctions for accepting money which would be lawful but for the subjective beliefs of the contributor's officers. Nothing in the Act requires the Commission to choose the vague and shifting subjective test advocated by Mr. Orloski instead of the clear and easily applied objective criteria consistently utilized by the Commission. To the extent that Mr. Orloski's argument is that the corporate officers' reported mistaken initial impression that the picnic was a campaign event under the Act is binding on the Commission, the district court properly rejected it (App. 85a). See p. 17, infra.

contrary, Congress has expressly left it to the Commission in matters like this to "formulate policy with respect to" the Act. 2 U.S.C. § 437c(b)(1). Mr. Orloski disagrees with the Commission's policy, and apparently believes (Br. 23) that any event at which an incumbent appears within six weeks of an election should be considered a campaign event. However, the Supreme Court has cautioned that "[s]uch policy arguments are more properly addressed to legislators or administrators, not to judges." Chevron v. Natural Resources Defense Council, 104 S. Ct. at 2793.

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.... The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

Id., quoting TVA v. Hill, 437 U.S. 153, 195 (1978). See also Chemical Manufacturers Ass'n v. Natural Resources Defense Council, 105 S. Ct. at 1112 ("[w]e do not sit to judge the relative wisdom of competing statutory interpretations").

C. The Commission Did Not Abuse Its Discretion In Determining That The Senior Citizens Picnic Was Not A Campaign Event

The district court carefully reviewed Mr. Orloski's factual allegations in light of the two part test established by the Commission, and properly concluded that the Commission did not abuse its broad discretion in determining that the Senior Citizens picnic was not a political campaign event subject to the Act.

1. No Communications At The Picnic Expressly Advocated Congressman Ritter's Reelection

Orloski alleged that buttons, name tags, and brochures were distributed at the picnic and that Ritter campaign posters were posted on the streets outside the park. He alleged that Ritter made a political speech at the picnic, and he alleged that Orloski supporters were denied access to the picnic because it was a partisan event. Mr. Orloski was not at the picnic, however, and his allegations were adequately refuted by the affidavit and documentary evidence submitted by the respondents.

Although Orloski alleged (App. 13a) that buttons and name tags advocating Ritter's election were passed out to everyone who attended the picnic, he provided no evidence of such buttons and name tags. As the district court observed, the evidence submitted by the respondents indicated "that two types of name tags were utilized: a) name tags offered to all persons attending the picnic which didn't even mention Ritter; and b) name tags worn by members of Ritter's congressional staff which identified them as holding staff positions but did not advocate the Congressman's reelection." (App. 81a-82a; 65a, 68a, 49a). On this record, the Commission did not abuse its discretion in concluding that the buttons and name tags, neutral on their face, did not expressly advocate Ritter's reelection.

Upon examination of the brochure distributed at the picnic, which was submitted by the respondents (App. 42a-45a), the Commission found it was devoid of any mention of Ritter's

candidacy for reelection. The brochure, entitled "Congressman Don Ritter Reports to the L.V. [Lehigh Valley]," merely discussed Ritter's congressional activities including issues relating to the elderly. Thus, the Commission properly concluded this allegation of express advocacy was also without substance (App. 68a).

Orloski's allegation that Congressman Ritter's speech at the picnic included express advocacy of his reelection again was supported by no evidence, and since Orloski was not at the picnic his own characterization of the speech carries little weight (App. 82a). Thus, as Judge Gasch concluded, the Commission was justified in concluding that "there was no evidence Ritter had advocated his election or the defeat of Orloski in the speech." (App. 82a.)

Orloski's claim that there were campaign posters of both candidates posted on the streets near the park, admittedly true according to the Ritter Committee's response (App. 28a), was insufficient on its face to prove express advocacy at the picnic. Orloski did not allege that there were any posters within the park where the picnic was held, and the Ritter Committee submitted photographs of the picnic to support its claim that there were none (App. 54a-60a). As the district court found, the Commission acted well within its discretion in concluding that normal campaign signs posted on neighboring streets are insufficient to transform the picnic into a political event because those posters have no bearing on the event occurring

inside the park (App. 69a, 82a-83a). Since such signs are routinely posted throughout a district during election campaigns, any other view would result in all of a candidate's activities during any preelection period being considered political.

Finally, Orloski contended that his supporters were barred from the picnic when they tried to pass out Orloski literature there (App. 14a-15a). As noted in the Ritter Committee's response (App. 28a-29a), which was supported by an affidavit from the treasurer of the Ritter Committee (App. 32a), the refusal to permit the distribution of campaign literature was entirely consistent with the picnic being a non-political affair. Thus, the Commission properly found no express advocacy of Ritter's election borne out in this allegation.

2. No Campaign Contributions Were Solicited Or Accepted At the Picnic.

The district court also properly affirmed the Commission's rejection of Orloski's allegations vis-a-vis the second criterion for determining whether an event is political: "whether or not contributions for the campaign were solicited or accepted at the event" (App. 83a). Indeed, as the district court noted, Orloski did not actually allege that there were any such solicitations (App. 83a). Rather, Orloski only asserted (App. 11a) that those individuals who solicited corporate contributions for the picnic also solicited contributions for Ritter's reelection on other occasions.

Orloski produced nothing to support his assertions that the three men at issue, Alex Roza, Jeff Werley, and Joe McHugh, were

soliciting for Ritter's reelection committee. However, the Ritter Committee produced evidence that, at the time of the picnic, all three of these individuals were members of Ritter's Congressional staff, rather than the separate staff employed by Ritter's campaign committee (App. 26a, 45a, 47a).[10/] As the district court found, even if an individual "solicited funds for the picnic before September 22 and for the campaign after October 1, there would still be no violation of the Federal Election Campaign Act. Similarly, the fact that the top officials of the corporations who subsidized the picnic were 'traditional Republican donors' would not be sufficient to establish that the event was political as even 'traditional Republican donors' can subsidize a public meeting without it becoming a campaign event." (App. 83a-84a)

3. The Commission Properly Rejected Orloski's Other Allegations

The Commission also properly rejected the other allegations made by Orloski to support his charges. First, Orloski asserted (App. 15a) that a campaign advertisement mentioning the Senior Citizens Committee contained an endorsement of Ritter's reelection. The Ritter Committee submitted a copy of the script of the advertisement in question (App. 50a) and, as the district court found, "the transcript ... makes clear that the

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10/ Orloski's assumption (App. 12a) that those three individuals must have planned the picnic and solicited the corporate donations, because the members of the Senior Citizens Committee never met in 1982, was also erroneous, for the Senior Citizens actually met three times in 1982, including the day of the picnic (App. 28a, 51a-52a). Moreover, even if true, the assistance of Ritter's congressional staff in organizing the event would only lend further credence to the conclusion that the picnic was organized in connection with Ritter's congressional duties.

advertisement does not state that the Senior Citizens Committee has endorsed Ritter but only that 'an active senior citizen in Whitehall,' Pennsylvania had done so." (App. 85a.)

Second, Orloski argued (Br. 17-19) that some newspaper articles attached to his complaint indicated that several officers of the corporations had stated that they would charge for their services because they believed the picnic was a campaign event and it would be illegal to donate their services. As noted, supra, p. 11 n. 9, the subjective belief of the officers of the corporations as to the nature of the picnic is not a controlling factor. Moreover, as the district court noted, "the only evidence that the services were originally characterized as having been sold rather than donated is contained in newspaper articles" (App. 85a), which are mere hearsay. Mayor of Philadelphia v. Education Equality League, 415 U.S. 605, 617-618 (1974); United States v. Abel, 258 F.2d 485, 495 (2d Cir. 1958), aff'd, 362 U.S. 217 (1960). Thus, the Commission's decision not to rely upon them could not reasonably be considered arbitrary in any event.[11/]

11/ Indeed, a fair reading of these articles indicate that there was some confusion initially about the nature of the picnic, but that the corporate officers were aware of the limitations of the Act and thus apparently intended to charge for their services until they later learned that the picnic was not a campaign event.

4. The Commission Properly Evaluated The Evidence Before It

The district court also properly rejected Orloski's argument that the Commission had miscontrued the "reason to believe" standard in 2 U.S.C. § 437g(a)(2):

> In essence, plaintiff maintains that the 'reason to believe' standard established in 2 U.S.C. § 437g(a)(2) as a prerequisite for an FEC investigation requires the Commission to make a determination analogous to that made by courts in ruling on motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and does not allow the Commission to make determinations based on credibility and other subjective factors.
>
> This construction of the reason to believe standard is not persuasive.

(App. 85a-86a, footnote omitted) It has long been recognized that "the reference to the belief of the Commission in section 437g(a)(2) makes clear that the Commission may consider all the information before it and exercise its own informed discretion." In re Federal Election Campaign Act Litigation, 474 F. Supp. at 1046. "The issue of whether a particular charge merits an investigation is a sensitive and complex matter calling for an evaluation of the credibility of the allegation, the nature of the threat posed by the offense, the resources available to the agency, and numerous other factors." Id. at 1045-1046. Accord, Common Cause v. FEC, 489 F. Supp. 738, 744 (D.D.C. 1980); Antosh v. FEC, 599 F. Supp. 850, 855 (D.D.C. 1984). See also, Heckler v. Chaney, 105 S. Ct. 1649, 1656 (1985). Mr. Orloski did not attend the picnic, and most of his allegations were stated in a conclusory manner. There was nothing in the record before the

Commission to substantiate Orloski's assertions that Ritter's re-election was advocated during the picnic or that political contributions were solicited or received during the picnic. The facts submitted by the Ritter Committee, in contrast, were supported by documentation and were affirmed by an affidavit from the treasurer of the Ritter for Congress Committee, who had personal knowledge of many of these facts. The Commission's rejection of Orloski's complaint in these circumstances was clearly within the broad discretion granted it under the Act, and the district court properly upheld its decision.[12/]

12/ Orloski is also apparently contending (Br. 25-29), as he did in the court below, that the Commission's procedures, which do not provide a complainant an opportunity to reply to a respondent's submission before the Commission, deny him due process. However, the Act does not require that complainants be given such an opportunity, and 2 U.S.C. § 437g(a)(12) provides that the Commission's ongoing proceedings under section 437g shall not be disclosed to anyone other than the respondent. This procedure did not deny Orloski due process in the Commission's investigatory process. Indeed, the Supreme Court recently reaffirmed that "the Due Process Clause is not implicated [in an investigatory proceeding] ... because an administrative investigation adjudicates no legal rights." SEC v. O'Brien, 104 S.Ct. 2720, 2725 (1984), citing Hannah v. Larche, 363 U.S. 420 (1960). See also, Georator Corp. v. EEOC, 592 F.2d 765, 768 (4th Cir. 1979) ("When only investigative powers of an agency are utilized, due process considerations do not attach.") Moreover, Mr. Orloski actually did receive an opportunity to respond to the Ritter Committee's allegations when the earlier lawsuit was dismissed to permit him to submit a new administrative complaint, along with any new evidence he might have, to rebut the Ritter Committee's earlier response and convince the Commission that there was reason to believe a violation had occurred. (See p. 1-2, supra.) In these circumstances, there is no basis for finding a violation of due process in the Commission's administrative proceedings.

CONCLUSION

For the reason set forth above, the Commission submits that this court should affirm the district court's judgment that the Federal Election Commission's dismissal of Orloski's administrative complaint was not contrary to law.

Respectfully submitted,

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