UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBINSON COMMITTEE, LLC and JACK E. ROBINSON, Petitioners,	)	Case No. 1:10-CV-11335-GAO
v.	)	
FEDERAL ELECTION COMMISSION, Respondent.	)	

PETITIONERS' OPPOSITION TO RESPONDENT'S RENEWED MOTION TO DISMISS THE PETITION

Petitioners Robinson Committee, LLC ("Committee") and Jack E. Robinson ("Robinson") hereby oppose the Renewed Motion to Dismiss the Petition ("Motion") filed by respondent Federal Election Commission ("FEC"). (Doc. # 11.) The FEC imposed a $6,050 civil money penalty against the Committee and Robinson (as Committee treasurer) for filing a post-election campaign finance report 81 days late. Because the FEC failed properly to consider whether the Committee used its "best efforts" to comply with the filing deadline, the Motion should be denied.

Moreover, because the FEC failed to explain its reasoning adequately and failed to offer legally sufficient reasons for its decision, the case should be vacated and remanded to the FEC for further proceedings, as was ordered by this Court in Lovely v. Federal Election Commission, 307 F. Supp. 2d 294, 301 (D. Mass. 2004).[1]

[1] Instead of filing a motion to dismiss on an undisputed administrative record, the FEC should have filed a motion for summary judgment. "Cross-motions for summary judgment are the standard method for presenting a case to a district court for decision on the record compiled by the administrative tribunal that the court is reviewing." Cox for U.S. Senate Committee v. Federal Election Commission, No. 03-3715, 2004 WL 783435, *1 (N.D. Il. Jan. 22, 2004).

I. BACKGROUND

A. Factual Background

The administrative record contains evidence of the following undisputed facts.[2]

In 2009, Robinson unsuccessfully campaigned for the Republican nomination for the U.S. Senate in the Massachusetts Republican primary special election to fill the seat held by the late Sen. Edward M. Kennedy. (Pet. ¶ 1.) Robinson lost the December 8, 2009 Republican primary to the eventual general election winner – Sen. Scott Brown. (Id.) Robinson self-funded his campaign entirely with personal funds. (Pet. ¶ 14.) Robinson is the treasurer of the Committee. (Pet. ¶ 2.)

The Committee's 2009 Year-End Report of Receipts and Disbursements ("Report"), covering campaign finance activity from November 19, 2009 through December 31, 2009, was required to be filed by January 31, 2010. (Pet. ¶ 6.) Robinson mailed the Report to the Secretary of the Senate on April 15, 2010, the same day that he filed his 2009 personal tax return.[3] (Pet. ¶¶ 7, 14.)

The Report was received by the Secretary of the Senate (and deemed filed) on April 22, 2010. (Pet. ¶ 7.) Thus, the Report was filed 81 days late. (Id.) On July 22, 2010, as a result of the late filing, the FEC made a final determination imposing a

[2] The relevant administrative record is attached to the Motion as Exhibit A ("Ex. A"), with page numbers appearing in the lower right-hand corner of each page. The FEC's final determination is contained in Exhibit C to the Motion ("Ex. C").

[3] Unlike House committees, Senate committees do not electronically file their FEC reports directly with the FEC. Rather, they must *manually* file the reports with the Secretary of the Senate, who then forwards the reports to the FEC. See 2 U.S.C. § 432(g)(1) and (2). Within 48 hours after receipt, the FEC makes the reports publicly available on the internet at www.fec.gov. See 2 U.S.C. § 438(a)(4) and § 434(a)(11).

civil money penalty against the Committee and Robinson, jointly and severally, in the amount of $6,050. (Pet. ¶ 12; Ex. C at 1.)

As described in several letters sent to the FEC, see, e.g., Ex. A at 6, the Report was filed 81 days late for two reasons. First, because Robinson's campaign was funded entirely by personal funds, he could not accurately complete the Report until he had tallied up all of the personal funds expended (exceeding $500,000) – which in turn could not be accurately accomplished until Robinson completed and filed his 2009 tax return (which occurred on April 15, 2010). (Pet. ¶ 14.)

Second, Robinson could not accurately complete the Report until he filed his 2009 taxes because the FEC had sent him several requests for additional information and various notices regarding the Report and other campaign finance reports due in 2009 and 2010 regarding the special senate election. (Pet. ¶ 15; Ex. A at 44-51.) In light of these requests for additional information, Robinson could not in good conscience file the Report knowing that it likely would contain incomplete and inaccurate information as a result of corrections required to be made to earlier reports.[4] (Pet. ¶ 16.) Robinson felt compelled to wait until he had all of the relevant *and correct* financial data available, which occurred only when he completed and filed his 2009 taxes on April 15, 2010. (Id.) Because the Committee mailed the Report the same day that Robinson mailed his 2009 taxes, the Committee and Robinson qualified to receive the benefit of the "best efforts"

[4] For example, the cash on hand at the end of the reporting period for an earlier report becomes the beginning cash on hand for the subsequent report, and thereby impacts the accuracy of the subsequent report.

provision found in 2 U.S.C. § 432(i) and 11 C.F.R. § 111.35(b)(3)(ii) (24-hour window). (Pet. ¶17.)

B. Procedural Background

On March 25, 2010, a six-person panel at the FEC voted unanimously to find reason to believe ("RTB") that a violation of the reporting requirements found in 2 U.S.C. § 434(a) had occurred, and to make a preliminary determination that a civil money penalty of $6,050 would be assessed. (Pet. ¶ 8; Ex. A at 12.) This penalty was based on the number of days the Report was late (81) and the number of prior violations (0). (Id.) On April 16, 2010, the Committee timely submitted a letter challenging the RTB finding. (Pet. ¶ 9; Ex. A at 6.)

On June 4, 2010, the FEC's Office of Administrative Review submitted its reviewing officer's recommendation to the FEC, a copy of which was sent to the Committee on June 8, 2010. (Pet. ¶ 10; Ex. A at 1.) The recommendation summarized the facts at issue, petitioners' submission, and the regulations, and then stated simplistically that because Robinson "had access to both his personal records and the Committee's records [he] could have calculated the total amount of loans he contributed to the campaign at any time." (Ex. A at 4.) As a result, the reviewing officer recommended that a fine of $6,050 be imposed for the 81 days the filing was late. (Id. at 5.) On June 18, 2010, the Committee submitted a letter objecting to the recommendation. (Pet. ¶ 11; Motion at Ex. B.)

The FEC voted unanimously on July 22, 2010, to make a final determination that the Committee and Robinson had violated 2 U.S.C. § 434(a), and assessed a

civil money penalty of $6,050. (Pet. ¶ 12; Ex. C.) A certification of this vote appears in the administrative record by reference (Ex. C at 1 ("On July 22, 2010, the Commission adopted the Reviewing Officer's recommendation")), but the administrative record does not contain an opinion or other statements of reasons by the FEC. (Id.) There was no oral hearing.

On August 9, 2010, this action was timely filed to challenge the penalty pursuant to 2 U.S.C. § 437g(a)(4)(C)(iii) and 11 C.F.R. § 111.38. On October 8, 2010, the FEC filed its first motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. # 5), but failed to confer with opposing counsel prior to filing as required by L.R. 7.1(A)(2). As a result, this Court denied the FEC's motion without prejudice on May 13, 2011. After conferring with opposing counsel, the FEC re-filed its Motion on May 25, 2011. (Doc. # 12.)

II. STANDARD OF REVIEW

Section 437g(a)(4)(C)(iii) of the Federal Election Campaign Act (2 U.S.C.) states: "Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court . . . a written petition requesting that the determination be modified or set aside."

The parties agree that the correct judicial review standard is governed by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), under which the Court must set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law." Id. Although "judicial review under the arbitrary and capricious standard is highly deferential," Western Sea Fishing Co., Inc. v. Locke, 722 F. Supp. 2d 126, 136 (D. Mass. 2010), the agency's decision will be overturned if "the agency lacks a rational basis for making the determination or if the decision was not based on consideration of the relevant factors." Centennial Puerto Rico License Corp. v. Telecomm. Reg. Bd. of Puerto Rico, 634 F.3d 17, 37 (1st Cir. 2011) (quoting River Street Donuts, LLC v. Napolitano, 558 F.3d 111, 114 (1st Cir. 2009)).

Furthermore, the Court "must assure itself that the agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." Lovely, 307 F. Supp. 2d at 298 (quotation marks and citations omitted). "In other words, we must know what a decision means before the duty becomes ours to say whether it is right or wrong." Harrington v. Chao, 280 F.3d 50, 60 (1st Cir. 2002) (citations omitted).

III. ARGUMENT

A. FEC Failed Adequately to Explain its "Best Efforts" Decision

The sole argument of the Committee and Robinson in this case is that because they used their "best efforts" to file the Report in a timely manner, and in fact did file the Report within 24 hours after the end of the circumstances causing the late filing (*i.e.*, Robinson's financial computations and accounting of the total loans he made to the Committee in conjunction with the filing of his 2009 personal tax return on April 15, 2010), the FEC's imposition of a penalty in this case was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law. See 2 U.S.C. § 432(i) ("best efforts" statute) and 11 C.F.R. 111.35(b)(3) ("best efforts" regulations).

"The best efforts statute . . . was described by its congressional sponsor as the 'anti-nit-picking amendment." Lovely, 307 F. Supp. 2d at 299 (citations omitted). Yet "nit-picking" is precisely what the FEC has done here. The FEC fails to understand how the real world works, and that self-funding political candidates are unable to file accurate financial reports with the FEC until they have compiled, in final and accurate form, all of their financial transactions and accounting information – which normally occurs at tax time. This is particularly true in this case, where during early 2010 the FEC sent the Committee three requests for additional information regarding reports that the Committee filed in late 2009 highlighting errors in those reports! It would have been irresponsible for the Committee to file the 2009 Year-End Report on time in January 2010 knowing that earlier reports required amendment and that the final accounting of Robinson's loans to the Committee would not be completed until it was time for him to file his personal tax return in April 2010.

The FEC did not make any determination on its own or provide any reasons for its determination. Instead, it simply adopted the reviewing officer's recommendation dated June 4, 2010. See Ex. C at 1 ("On July 22, 2010, the Commission adopted the Reviewing Officer's recommendation and made a final determination that the Robinson Committee, LLC and you, in your official capacity

as Treasurer, violated 2 U.S.C. § 434(a) and assessed a civil money penalty of $6,050.").

But even the reviewing officer's report was deficient in its analysis of the Committee's "best efforts" defense. The reviewing officer summarily announced that the Committee "failed to prove that the Candidate's need to prepare his taxes prevented them from filing the Year End Report on time." (Ex. A at 4.) This is a far cry from the "reasoned basis" normally required to uphold agency action. See Lovely, 307 F. Supp. 2d at 298 ("[A]lthough the court is to uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned, . . . it may not supply a reasoned basis for the agency's action that the agency itself has not given.") (citations and quotation marks omitted).

The FEC also argues that because only one request for additional information was issued prior to the Report's January 31, 2010 filing deadline, the Committee had "adequate time to complete both tasks." (FEC Mem. at 12.) Such an argument is reflective of an agency that is completely out-of-touch with the operational and financial obstacles faced by a thinly-staffed (Robinson serves as his own Committee treasurer (Pet. ¶ 2) and files all of the Committee's reports), grass-roots campaign, where non-professional staff members (let alone the candidate himself) do not have the luxury of dropping their full-time livelihoods in the middle of the worst recession since the Great Depression when the FEC suddenly announces two weeks prior to the filing deadline of a year-end report that errors must be corrected in an earlier report. As former FEC Commissioner Bradley Smith has written: "The

burdens of FEC enforcement are often felt by those who best exemplify American civic involvement . . . While large committees with abundant resources are usually able to cope with the FECA as a cost of doing business, campaigns reliant on volunteers often find compliance with the Act to be especially difficult." Bradley A. Smith and Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, Election Law Journal, Vol. 1, No. 2, at 147 (2002).

"In its final determination, the FEC did not made [sic] findings of fact, make a statement of reasons, incorporate the reviewing officer's recommendation by reference, or issue any opinion at all." Lovely, 307 F. Supp. 2d at 301. "In sum, the [FEC's] reasoning was inadequate. . . . A remand will give the [FEC] an opportunity to better explain [its] position." Rhode Island Hosp. v. Sebelius, 670 F. Supp. 2d 148, 158 (D. R.I. 2009) (vacating and remanding to agency for further proceedings). For the same reasons, this Court should vacate and remand this case to the FEC for further proceedings to provide the FEC with an opportunity to better explain its decision to deny the Committee's "best efforts" defense.

CONCLUSION

On this record, as in Lovely, the Court need not decide whether the FEC's action was arbitrary or capricious (even though it was). It is enough that the FEC failed to explain its reasoning adequately and failed to offer legally sufficient

reasons for its decision. As a result, this Court should vacate and remand the case for further consideration by the FEC of the Committee's "best efforts" defense.[5]

Respectfully submitted,

ROBINSON COMMITTEE, LLC and JACK E. ROBINSON,

By their attorneys,

/s/ Jack E. Robinson
Jack E. Robinson (BBO #559683)
ROBINSON LAW OFFICES
300 First Stamford Place, Suite 201
Stamford, CT 06902
(203) 425-4500
(203) 425-4555 (fax)
Robinsonesq@aol.com

Dated: June 8, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on the date hereof.

/s/ Jack E. Robinson
Jack E. Robinson

[5] The FEC also argues that service of process was insufficient. (FEC Mem. at 16, n.3.) The normal government service requirements contained in Fed. R. Civ. P. 4(i) (*i.e.*, serving the U.S. Attorney in Massachusetts and the Attorney General in Washington) are excused in this case by operation of 28 U.S.C. § 1391(e) (last par.), which allows service on the FEC *solely* by certified mail because the FEC is "beyond the territorial limits of the district in which the action is brought." Id.