



Federal Election Commission
Washington, DC 20463

SECRETARIAT

2004 DEC -2 P 14: 28

MEMORANDUM

SENSITIVE

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Allan D. Silberman
Director, ADR Office

BY: Lynn M. Fraser
Assistant Director, ADR Office

SUBJECT: Recommendation to Close the File on ADR 208

DATE: December 1, 2004

On October 29, 2004, the ADR Office ("ADRO") received this matter from OGC/CELA to review and determine its appropriateness for ADR processing. Based on that review, we determined that the case, **ADR 208** is inappropriate for ADR and recommend that the case be closed. Following the procedures approved by the Commission on March 3, 2003, this matter will be closed by ADRO if the Commission approves the recommendation in this memorandum. The Office of General Counsel ("OGC") concurs in the description of this matter and also concurs that it will not be returned to OGC for further action.

ADR 208/MUR 5531: The complaint alleges that Philip Capitano ("Respondent"), Republican candidate for Mayor of the City of Kenner, Louisiana, funded two communications that expressly advocate the election of federal candidates but failed to report independent expenditures to the FEC as required. The mailings failed to display adequate information about who authorized and/or paid for the advertisements. The Complainant subsequently requested that his complaint be withdrawn. Respondent contends that his intent was promoting his own election to Mayor of Kenner and did not intend to promote federal candidates.

Attached for the Commission's review is the *ADR Case Analysis Report (CAR)* on ADR 208, along with copies of the EPS Rating and ADR Rating reports.

ADR Director's Recommendation: We recommend that the Commission take no further action on ADR 208/MUR 5531, that the file be closed and the appropriate letters sent.

ADR CASE ANALYSIS REPORT

ADR Case: 208

Respondents: Philip L. Capitano

MUR: 5531

OGC Case Open Date: 9/13/04

Respondent's Rep.: Michael G. Gaffney, Esq.

Date Forwarded to ADRO: 10/29/04

Committee Name: Philip L. Capitano for Mayor

Date Reviewed by ADRO: 11/10/04

Committee Type: Local mayoral

District #/or State: LA

Election - Won/Lost: N/A

Election Cycle: 2004

Complainant: Nick A. Congemi

Summary of Complaint: The Complainant alleges that Philip Capitano ("Respondent"), Republican candidate for Mayor of the City of Kenner, Louisiana, funded two communications that expressly advocate the election of federal candidates but failed to report independent expenditures to the FEC as required. The mailings failed to display adequate information about who authorized and/or paid for the advertisements. One mailing displays the text "Let's Continue to Support Our Endorsed Republican Leaders!" and has pictures of President George W. Bush and Senator David Vitter, as well as Respondent. The second mailing displays the text "This Tuesday, May 9, 2004, Please Vote for the Candidates that are for YOU!" and features a picture of Senator John Kerry, as well as local candidates and Respondent. Both advertisements have text that states they were paid for by Phil Capitano, but neither say if they were authorized by the candidates pictured. The Complainant subsequently requested that his complaint be withdrawn.

Violations Alleged: 2 U.S.C. §§ 434(c)(1) and (2), 441d(a)(3), 441d(c), 11 C.F.R. § 109.10(b)

Respondent's Reply: Respondent contends that he was not trying to endorse or advocate the election of either George W. Bush, David Vitter or John Kerry, but was only promoting his own election to the office of Mayor of Kenner, Louisiana. Respondent further contends that the complaint came out of a bitter and acrimonious fight for the office of Mayor, and that the Complainant was Respondent's opposition in the mayor race.

Issues:

- Reporting independent expenditures 2 U.S.C. §§ 434(c)(1) and (2), 11 C.F.R. § 109.10(b)
- Express advocacy 2 U.S.C. § 441d(a), 11 C.F.R. §§ 100.22, 110.11(a)(2)
- Disclaimers 2 U.S.C. §§ 441d(a)(3), 441d(c), 11 C.F.R. §§ 110.11(b)(3), 110.11(c)

Related FEC Experience/Guidance: There have been numerous matters dealing with the issues of failing to report independent expenditures, express advocacy and inadequate disclaimers that have come before the Commission. Most of these matters were resolved through civil penalty assessments and/or other terms, such as attending a seminar sponsored by the Commission. The majority of these matters appear to refer to larger political action committees spending considerably more than that spent by this candidate for local office.

Analysis: The statute and the regulations are fairly clear that every person who spends an aggregate in excess of \$250 during a calendar year on independent expenditures expressly advocating the election or defeat of a federal candidate(s) shall report it to the Commission within twenty-four hours. Respondent incorrectly argues that because his mailers had only pictures of federal candidates without words expressly advocating the election or defeat of a clearly identified federal candidate, that there was no express advocacy and thus, no independent expenditure. The regulations state that "clearly identified" means a candidate's "... name, nickname, *photograph* ..." appear, and "... the identity is otherwise apparent" Thus, by having photographs of easily recognizable candidates such as President Bush, Senator Vitter and Senator John Kerry, as well as words such as "support," "endorsed," and "vote" on his mailers, the expense attributable to the federal candidates would be considered independent expenditures. The regulations, however, go on to explain the allocation of expense attributable to federal candidates, and that the cost should be allocated by the amount of space devoted to each candidate. 11 C.F.R. § 106.1. The photographs of President Bush and Senator Vitter comprised approximately 7% of the page, and Senator Kerry's photograph comprised less than 1% of the page on the second advertisement. These were printed on sheets of paper eight and one-half inches by eleven inches and each folded to form its own envelope. There is no indication of how many were printed and mailed by Respondent, nor the total cost for the two, but as they were for a local election, the number of voters would be limited. Therefore, it would appear that the total of Respondent's expenditures for these two communications, allocated for federal candidates, would aggregate less than \$250 in the calendar year 2004. Based on just this issue, it appears Respondent may not be subject to the FECA and required to report the expenditure based on the amount he spent on these two mailings.

On the disclaimer issue, Respondent had text on both mailings indicating that he had paid for the advertisement. However, neither communication indicates if the candidates pictured authorized the mailings. In the advertisement picturing President Bush and Senator Vitter, the text is placed at the bottom of the page using a very small font. The mailing with the picture of Senator Kerry, as well as local candidates, has adequate size text stating that it was paid for by Respondent, but neither mailing has the disclaimer in a box, or provides adequate information, such as a permanent street address and telephone number of the person who paid for the advertisement.

Given the *de minimis* nature of these allegations, the ADR Office recommends that the Commission not devote more resources to the matter, and close the file.

ADR Director's Recommendation: DISMISS