PERKINSCOIE

700 13th Street, NW
Suite 600
Washington, DC 20005-3960

+1.202.654.6200
+1.202.654.6211
perkinscoie.com

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Brian G. Svoboda
BSvoboda@perkinscoie.com
D. (202) 434-1654
F. (202) 654-9150

VIA E-MAIL KROCHE@FEC.GOV

Krista J. Roche, Esq.
Assistant Director
Alternative Dispute Resolution Office
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: ADR 745
Democratic Party of Illinois and Michael Kasper, Treasurer

Dear Ms. Roche:

I appreciate the opportunity to provide these views on behalf of the Democratic Party of Illinois and Michael Kasper, Treasurer, in the above-referenced ADR. This referral arose from reports filed nearly five years ago. It presents two findings and four asserted violation amounts, some involving complex questions of reporting Federal Election Activity. But the matter can be easily understood as follows:

- First, the bulk of Finding 1 arose from one erroneous wire transfer of $137,089, which was followed by the return of these same funds within six days.

- Second, all of Finding 2 arose from a single mailing that was reported on Schedule H4 instead of Schedule H6. The public interest was not substantially affected by this lapse. There is no dispute that the mailing was financed correctly. And the funds used to pay for the non-federal share were required to be disclosed separately under Illinois state law.

- Third, both of these transactions occurred in October and November 2010. This was two-and-a-half years before the Party, in cooperation with the ADR office, adopted a wide range of targeted, remedial measures addressing just these sorts of issues. The only reason these transactions are before ADR now is because the Commission's audit of the Party's 2010 activities took almost three years.

We respectfully submit that these facts should inform the final disposition of this matter. In particular, to impose a penalty according to normal Commission schedules would be inappropriate. To apply the normal fine schedules would generate a grossly disproportionate penalty. And were this matter to proceed to conventional enforcement, the law suggests that there would be no penalty at all. A final negotiated settlement should reflect these considerations.

FACTUAL DISCUSSION

At issue here are transactions that occurred in October 2010. Since then, the Party has made significant improvements to its internal practices. In August 2013, it settled ADR 647 and agreed to take a series of remedial measures, including trainings for its staff and vendors, and implementation of a compliance manual. In May 2014, the Party settled ADR 675 and took additional measures to train its staff and vendors on Levin funds. **The conduct involved in this referral preceded both of these matters.**

Two findings from the 2010 Final Audit Report were referred to ADR. First, the auditors found that the Party underreported $203,666 in receipts and $215,667 in disbursements for calendar year 2010. Second, they found that the Party in 2010 did not report Levin funds totaling $115,274 and incorrectly disclosed a $144,374 Federal Election Activity expenditure as a shared operating expenditure.

These findings arose almost entirely from two transactions:

First, the misstatement finding arose mainly from an errant $137,089 wire transfer that the Party made on October 27, 2010, to Illinois Victory, which was a subordinate party committee. On November 1 and November 2—five and six days later, respectively—Illinois Victory wired back a combined $138,089. The initial wire and subsequent return of the funds all occurred during the same reporting period and were omitted from the Post-General Report. The initial wire represents 64% of the disbursement misstatement finding; the corrective return represents 68% of the receipt misstatement finding.

Second, the Levin fund and disclosure findings both arose from a lone $144,375 payment to Gardner Thomas Assets LLC on October 15, 2010, for a generic vote-by-mail piece. The Party initially reported the payment on Schedule H4, which covers allocated federal and non-federal activity. But because the payment qualified as get-out-the-vote activity, the Party should have reported it instead on Schedule H6, which covers shared Federal Election Activity. *See* 11 C.F.R. § 300.36(b)(2)(iii) (2010). It also should have reported the non-federal donors whose $115,274 were treated as Levin funds and used to pay the non-federal share of the expense. *See id.* § 300.36(b)(2)(iv).[1] Nonetheless, the Party was already required to disclose these same donations on its reports with the Illinois State Board of Elections. *See* 10 Ill. Comp. Stat. § 5/9-11(a)(4) (2010). To emphasize: the $144,375 and $115,274 cited in the referral do not involve separate conduct. They both relate to the same mailing.

In 2010, the Party lacked sufficient expertise in the extremely complicated rules regarding the reporting of mixed Federal Election Activity expenses. Many, if not most, state parties shun

[1] In 2010, the Party was allowed to pay shared Federal Election Activity expenses on a ratio of 21% federal/79% nonfederal. *See* 11 C.F.R. § 300.33(b)(3) (2010). $115,274 is 79 percent of $144,375.

these rules, and pay for their Federal Election Activity entirely with federal funds. However, the Party's heavy emphasis on state and local races makes it advantageous to allocate its Federal Election Activity, and pay for non-federal activity with non-federal funds so far as Commission rules allow. While the 2010 audit was ongoing, the Party worked with the ADR office to develop specific training programs on precisely these issues. *See* Negotiated Settlement, ADR 675 ¶ 6. The Party respectfully submits that its recent reports show significant improvement in this area, just as the ADR process was intended to provide. The question now before the Commission is whether it should seek further penalties over issues that the Party has already successfully worked to address in ADR.

CONCLUSION

Neither of the transactions primarily involved here involves the sort of core disclosure issues which the Commission's penalty schedules usually address. In the case of the asserted misstatement, the Party mistakenly made and promptly sought to correct an erroneous wire transfer. In the case of the vote-by-mail piece, the Party initially disclosed the mailing, but on the wrong schedule, and then corrected the reporting when the auditors recommended that it do so. Treating these findings for penalty purposes as if the Party had entirely omitted actual, intended transactions—as an application of the normal fine schedules would do—would be inconsistent with the Commission's duty to "treat like cases alike." *Bush-Quayle '92 Primary Committee, Inc. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997). For this reason, a proposed penalty calculated according to normal schedules would be grossly inflated.

Indeed, in the regular enforcement process, the circumstances would counsel toward no penalty in this matter. A court hearing this matter de novo would be required to consider: (1) the good or bad faith of the respondent, (2) the injury to the public, (3) the defendant's ability to pay, and (4) the need to vindicate the Commission's authority. *See FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989). *Accord FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1058 (C.D. Cal. 1999); *FEC v. Kalogianis*, 2007 WL 4247795 (M.D. Fla. Nov. 30, 2007).

There is no suggestion that either of these findings resulted from bad faith, and the Party cooperated with the auditors to amend its reports when these issues were noted. Nor is there a clear, strong basis to assert public injury: the Party complied with the limits and source restrictions, and in the case of the Levin fund reporting, the omitted information was available elsewhere on the public record. While the Party continues to raise funds to support its speech and associational activities, it is far from clear that the Commission needs to vindicate its authority through a penalty. The Commission itself has spoken about the need to address "the challenges faced by political parties engaged in federal campaign finance activity." News Release, FEC Chairman Goodman and Vice Chair Ravel Host Political Party Forum (June 4, 2014), *available at*, http://www.fec.gov/press/press2014/news_releases/20140604release.shtml. The application of the complex Federal Election Activity restrictions to parties with a

demonstrable, bona fide interest in nonfederal elections is one such challenge. The fact that the Party has already worked cooperatively and effectively with the Commission to address the circumstances that led to these findings further reduces the need for adverse action.

We submit these views, hoping that they might provide some context and background as we work to resolve this matter timely, as we know you seek to do. As noted above, we would appreciate it if you would please share these views with the Commissioners, and I welcome the opportunity to discuss them at your soonest convenience.

Very truly yours,

Brian G. Svoboda