



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

CONCURRING OPINION
OF
CHAIRMAN JOAN D. AIKENS

TO
ADVISORY OPINION 1977-67

I have joined the majority in this Advisory Opinion for two reasons. First, I believe that guidance on the question presented is desperately needed by the public and this Opinion provides such guidance. Second, I believe that the conclusion on these particular facts is a correct one, although I am not entirely in agreement with the reasoning used to reach that conclusion. In fact, I retain substantial anxieties as to the direction in which the Commission is headed in dealing with "members" and "membership organizations."

The basic issue in this Opinion is what constitutes a membership relationship for purposes of 2 U.S.C. §441b. A membership organization under this Section is limited to those groups of individuals who have voluntarily associated in corporate form. Unincorporated associations are not subject to §441b. The significance of what constitutes a membership organization or a member of such an organization lies in the ability of the corporation to use general funds to establish and maintain a separate segregated fund for political purposes and to solicit voluntary contributions to such a fund solely from its "members." 2 U.S.C. §441b(b)(4)(C). Membership organizations which elect to conduct their activities in corporate form are subject to the general prohibitions of §441b and its narrow exceptions dealing with separate segregated funds.

My concerns begin with the inference in this Advisory Opinion that membership organizations are analogous to the other major entities subject to §441b, i.e., business corporations and labor organizations. For several reasons, I think that the Commission must be wary of such comparisons. Incorporated membership organizations were inserted into §441b in the 1976 Amendments.

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The legislative history on this insertion is slim and therefore suggests to me that the legislature was somewhat unfocused as to its intended effect. Prior to 1976, it appears that such groups were not within the ambit of §441b. Representative Hansen himself indicated during the debate on the 1971 Act that certain organizations even though incorporated would not be subject to the prohibition in §441b. 117 Cong. Rec. H11480-81 (daily ed. Nov. 30, 1971).

Shareholders, union members and members of ideological organizations defy comparison. The type of relationship that exists between a business corporation and its shareholders and between a union and its members is entirely different from that between an association such as PSRC and individuals who join this group as members. Unions and corporations have long been recognized as economic interests within our society and within the framework of the election laws. It is for that reason that Congress chose to proscribe their political activity. However, with respect to groups such as PSRC, the relationship between this incorporated membership organization and its members is ideological rather than economic. Whereas the shareholder may be interested in higher profits and therefore a higher return on investment, and whereas the union member will be interested in improved wages and working conditions as negotiated through the collective bargaining process, those who join PSRC seem to do so for ideological reasons. For this reason, the terms upon which an individual establishes or enters into a relationship with a corporation or a labor union may not be transferable to other membership relationships. "Rights and obligations" in the context of union membership may be virtually meaningless in the context of membership in a group such as PSRC. Oftentimes "rights" are a matter of statute, such as a union member's bill of rights. 29 U.S.C. §§411-413.

Let us assume, however, that union members were intended by Congress to be comparable to members of other forms of associations. What is it that makes an individual a member in the union? It could not be the mere payment of predetermined dues. Such payments would make workers who are subject to an agency shop agreement members of the union when, in fact, they are not. Payment of dues may be a consequence of joining a union,

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but it is not an act which confers membership. To the contrary, it is a well settled principle that an employee's signature on a membership card constitutes membership in the union because it manifests the requisite intent and desire to be a member. NLRB v. Delaware-New Jersey Ferry Co., 128 F.2d 130, 134 (3d Cir. 1942).

By the same token, this Commission should look to whether persons considered by PSRC as members actually consider themselves to be members. Have they manifested an intent or desire to be a member? It is my opinion that a "member" is an individual who knowingly and voluntarily associates himself or herself with the organization. This criterion would preclude a bogus membership organization which exists only in computer tapes containing hundreds of thousands of names. Affirmative acts on the part of an individual are necessary to become a member. The "membership" organization may not merely unilaterally choose those who it wishes to consider as its members. The PSRC has submitted Exhibits (Exhibits C and D) which demonstrate that this organization specifically requests individuals to become members and to return a card to affirm a desire to join as members. Once an individual makes such an affirmative response to the request, the membership relationship has been created.

"Direct and enforceable participatory rights in the organization" (AO 1977-67) are not necessary ingredients in the formation of the membership relationship. This notion is not contained anywhere in §441b, nor is it consistent with the thrust of the Commission's Regulation §114.1(e), which defines "member." That definition makes it clear that one is a member if he or she is "currently satisfying the requirements for membership in a membership organization." There is no ambiguity that it is the membership organization which establishes the terms, i.e., "the requirements," of membership. It is the individual who is free to seek or spurn membership on the terms offered. The terms of membership may include "rights and obligations vis-a-vis the corporation" but it is not mandatory. For the Commission to prescribe an exclusive class of substantive rights in order to limit the type of associations which would qualify as "bona fide" membership organizations within the meaning of the

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Act would inevitably and needlessly interject the govern-
ment into an essentially private concern among individuals
who are merely exercising their First Amendment right
of association.

Once it was established that PSRC members have
expressed a specific and unambiguous desire to be members,
there was no need to require rights and obligations such
as predetermined dues or periodic renewal of membership.
The opinion intimates that persons with "lesser rights
or obligations vis-a-vis the corporation" may be members.
In future cases, I hope that the Commission will focus
much less on "rights and obligations" and more on the
knowing and voluntary association of individuals.

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