

FEDERAL ELECTION COMMISSION  
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FIRST GENERAL COUNSEL'S REPORT

**SENSITIVE**

MUR: 4643  
DATE COMPLAINT FILED: 5/30/97  
DATE OF NOTIFICATION: 6/11/97  
DATE ACTIVATED: 1/26/99

STAFF MEMBER: J. Michael Lehmann

COMPLAINANTS: Republican Party of New Mexico  
John Dendahl, Chairman

RESPONDENTS: Democratic Party of New Mexico—Federal and Thomas Atcitty,  
as treasurer  
Democratic Party of New Mexico—Non-Federal (State) and  
Thomas Atcitty, as treasurer  
Friends of Eric Serna for Congress and John Pound, as treasurer  
Democratic Republican Independent Voter Education Committee  
and Tom Sever, as treasurer  
Fabian Chavez, Jr.  
Diane Wood  
Joseph Montoya  
Tino Monaldo  
Randy Dukes

RELEVANT STATUTES: 2 U.S.C. § 431(17)  
2 U.S.C. § 431(18)  
2 U.S.C. § 434(b)  
2 U.S.C. § 441a(a)  
2 U.S.C. § 441a(d)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441b(a)  
2 U.S.C. § 441d(a)  
11 C.F.R. § 100.17  
11 C.F.R. § 100.22  
11 C.F.R. § 102.5  
11 C.F.R. § 102.9(b)  
11 C.F.R. § 104.3  
11 C.F.R. § 104.13  
11 C.F.R. § 106.5

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11 C.F.R. § 109.1  
11 C.F.R. § 110.6(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

**I. GENERATION OF MATTER**

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This matter arises from a complaint filed with the Federal Election Commission (hereinafter the "Commission"), on June 9, 1997 by the New Mexico Republican Party, by and through its Chairman John Dendahl. Complainant alleges that the Democratic Party of New Mexico made a series of expenditures for the purpose of influencing a special election for a House seat and paid for these expenses with a significant amount (86%) of non-Federal money. Respondents Democratic Party of New Mexico and Thomas Atcitty,<sup>1</sup> as treasurer, (hereinafter collectively referred to in the singular as "DPNM" or "the party") and Friends of Eric Serna for Congress and John Pound, as treasurer, (hereinafter collectively referred to in the singular as "Serna") were notified of the complaint on June 11, 1997. DPNM responded to the complaint on August 11, 1997. Serna responded to the complaint on August 25, 1997.

On October 31, 1997, complainant filed an amendment to the complaint (1) itemizing over \$100,000 in allegedly illegal expenditures made by DPNM, (2) alleging that contributions to DPNM (from four individuals and a political committee) were earmarked for Serna, and (3) alleging that an additional \$48,000 in disbursements to a member of DPNM's staff, Randy Dukes, paid for by largely non-Federal money, were for the purpose of influencing a Federal election. Respondents were notified of the amendment to the complaint on November 6, 1997.

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<sup>1</sup> The Commission notified the party and its then treasurer, Joseph Cervantes. He was replaced by Thomas Atcitty at the beginning of 1998.

Serna and DPNM filed further responses in November and December, 1997, respectively.

Fabian Chavez, Jr. responded in November, 1997. Diane Wood, Tino M. Monaldo, Joseph Montoya, and the International Brotherhood of Teamsters Democratic-Republican-Independent Voter Education Political Committee and its treasurer, Tom Sever (collectively "DRIVE") filed responses in December, 1997.<sup>2</sup>

## II. FACTUAL AND LEGAL ANALYSIS

### A. Law

#### 1. General Limits and Prohibitions of the Act

Under the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations, contributions<sup>3</sup> are subject to certain limitations and prohibitions. *See, e.g.*, 2 U.S.C. §§ 431(8), 441a, 441b, 441c, 441e, 441f, and 441g; 11 CFR Parts 100, 110, 114, and 115. Similarly, disbursements that constitute expenditures<sup>4</sup> must be made with funds subject to the limitations and prohibitions of the Act. *See, e.g.*, 2 U.S.C. § 431(9)(A); 11 C.F.R. §§ 109.1(a), 114.2(b), 110.4(a)(1), and 115.2(a). In addition, the Act prohibits political committees from knowingly accepting contributions in violation of the statutory limitations, *see* 2 U.S.C. § 441a(f), or knowingly accepting prohibited contributions. *See, e.g.*, 2 U.S.C. § 441b.

<sup>2</sup> On August 27, 1998, complainant filed another "amendment," submitting Advisory Opinion 1998-9, and indicating that it is directly on point in the present matter. On August 28, 1998, respondents were informed of this additional submission. On September 21, 1998, DRIVE filed a further response, referring the Commission back to its earlier response.

<sup>3</sup> The Act defines "contribution" as including "any gift, subscription, loan, advance, . . . or anything of value made by any person for the purpose of influencing any election for Federal office . . ." 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.7(a)(1).

<sup>4</sup> The Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . ." 2 U.S.C. § 431(9)(A)(i) and 11 C.F.R. § 100.8(a)(1).

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The Act defines "independent expenditure" as "[1] an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate [2] which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17). "Expressly advocating" means that the communication includes phrases or other words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s). 11 C.F.R. § 100.22(a). All expenditures expressly advocating the election or defeat of a clearly identified candidate must clearly identify who has paid for the communication and whether the communication was authorized by a candidate or authorized political committee. 2 U.S.C. § 441d(a).

The Commission's regulations define "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate" as any "arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication." 11 C.F.R. § 109.1(b)(4)(i). The regulations further provide a presumption that expenditures are coordinated if they are based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made, or made by or through any person who is, or has been, authorized to raise or expend funds, who is or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent. *Id*

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"[C]ontrolled or coordinated expenditures are treated as contributions" under the Act.

*Buckley v. Valeo*, 424 U.S. 1, 46 (1976). Such coordinated expenditures result in several reporting obligations on behalf of both the donor, when it is a reporting entity, and the recipient committee. The donor must disclose the expenditure as a contribution, the date and amount of such contribution and, in the case of a contribution to an authorized committee, the candidate's name and office sought. 2 U.S.C. § 434(b)(4)(H)(iv) and (6)(B)(iv). The recipient committee must disclose the expenditure as an in-kind contribution, the identity of the donor and the year-to-date aggregate total for such donor. 11 C.F.R. § 104.3(a)(4).

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The definition of "contribution" includes those "which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit." 11 C.F.R. § 110.6(a). Commission regulations define "earmarked" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b). For purposes of the monetary limits of the Act, "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." 2 U.S.C. § 441a(a)(8). "The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient." *Id.*

The Act requires that political committees report the total amounts of expenditures made in the same reporting period in which they occurred. 2 U.S.C. § 434(b)(4). Itemization requires providing the full name and address of each such person or entity together with the date and

amount of any such disbursements. 11 C.F.R. § 104.3(b)(4)(i). The political committee's treasurer bears the obligation of fulfilling this reporting requirement. 11 C.F.R. § 102.9(b)(1).

**2. Provisions of the Act Unique to Party Committees**

The Act includes limits on coordinated expenditures by a State committee of a political party in connection with the general election campaign of a candidate for the U.S. House of Representatives in that State. 2 U.S.C. § 441a(d)(3)(B). The limit for a party's coordinated expenditures for the 1997 special election in New Mexico's Third Congressional District was \$31,810.

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The Act limits to \$5,000 per election the amount which any multicandidate committee, including a state party committee, may contribute to a candidate and his or her political committee. 2 U.S.C. § 441a(a)(2)(A). Thus, party committees are entitled to make both direct and in-kind contributions to candidates up to \$5,000 and also to make coordinated expenditures in connection with the campaigns of the same candidates up to their Section 441a(d) limitations. When such coordinated expenditures, alone or in combination with direct contributions to a candidate made pursuant to Section 441a(a)(2)(A), exceed the combined limitations of Sections 441a(a)(2)(A) and 441a(d), violations of 2 U.S.C. § 441a(a)(2)(A) by the party committee and of 2 U.S.C. § 441a(f) by the recipient candidate committee result.

Party committees are required to report expenditures made pursuant to 2 U.S.C. § 441a(d) in its periodic reports. U.S.C. § 434(b)(4)(H)(iv) and (6)(B)(iv). Such expenditures are reported by the party committee only, while contributions are reported by both the party committee and the recipient candidate committee. Authorized committees of candidates must report the full name and address of any political committee from which it receives a contribution, along with

the date and amount of the contribution. 2 U.S.C. § 434(b)(3)(B). In-kind contributions must also be reported as both contributions received and expenditures made. 11 C.F.R. § 104.13(a)(2).

A party committee that makes independent expenditures has specific reporting requirements. *See* 2 U.S.C. § 434(b)(4)(H)(iii) and (6)(B)(iii). The party committee must report the date, amount, and purpose of the independent expenditure. 2 U.S.C. § 434(b)(6)(B)(iii). The party committee must further indicate whether the expenditure is in support of, or in opposition to, a candidate, and certify, under penalty of perjury, that the expenditure was not made in coordination with the candidate. *Id.*

### 3. The Commission's Allocation Regulations

Each political committee, including a party committee, which finances political activity in connection with both Federal and non-Federal elections is required to establish a separate Federal account for all disbursements, contributions, expenditures and transfers by the committee in connection with any Federal election, unless it receives only contributions subject to the prohibitions and limitations of the Act. 11 C.F.R. § 102.5(a)(1)(i) and (ii). Except as provided for in 11 C.F.R. § 106.5(g), no transfers may be made to such Federal account from any other account(s) maintained by such committee for the purpose of financing activity in connection with non-Federal elections, and only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate Federal account. *Id.*

Commission regulations set forth specific procedures for party committees in making disbursements in connection with both Federal and non-Federal elections. 11 C.F.R. § 106.5(a). Rather than making such disbursements entirely from funds raised subject to the prohibitions and limitations of the Act, party committees – if they have established separate Federal and non-Federal accounts, *see* 11 C.F.R. § 102.5 – may allocate them between these accounts according

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to various formulas set forth in the regulations. The categories of activity to which allocation applies include, *inter alia*, administrative expenses and expenses for generic voter drive activities. "Administrative expenses" are defined as "including rent, utilities, office supplies, and salaries, *except for such expenses directly attributable to a clearly identified candidate.*"

11 C.F.R. § 106.5(a)(2)(i) (emphasis added). "Generic voter drives" are described as "including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, *without mentioning a specific candidate.*" 11 C.F.R. § 106.5(a)(2)(iv) (emphasis added). For state and local party committees, administrative expenses and generic voter drive costs are allocated using the "ballot composition method," which is based on the ratio of Federal and non-Federal offices expected to be on the ballot in the next general election in that particular state. 11 C.F.R. § 106.5(d).<sup>5</sup>

#### 4. "Clearly Identified" and "Mentioning a Specific Candidate"

The Act defines "clearly identified" as meaning "(A) the name of the candidate involved appears, (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18). Commission regulations further define "clearly identified" as.

the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate

<sup>5</sup> The Explanation and Justification to the allocation regulations at 55 Fed. Reg. 26064 (June 26, 1990) states that 11 C.F.R. § 106.5(d)(1) "also generally covers years in which a special election is held." It also states that "because of the varying situations that might arise, the Commission has not spelled out rules to cover each variation," and that "the allocation formula to be used and attribution of disbursements to specific candidates will have to be determined on a case-by-case basis." See Advisory Opinions 1991-25, 1991-15, and 1991-6.



for the Senate in the State of Georgia.”

11 C.F.R. § 100.17. Accordingly, candidate-specific activity, such as that pertaining to a clearly identified or specific candidate, does not constitute generic voter activity and is not allocable under Section 106.5. Such candidate-specific disbursements, if made in support of a Federal candidate, constitute “contributions” to or “expenditures” on behalf of that candidate and would be subject to the limitations and prohibitions under the Act.

**B. Facts**

On February 13, 1997, Congressman Bill Richardson of New Mexico resigned his seat to become the United States’ Ambassador to the United Nations. As a result, a special election to fill the vacant seat in New Mexico’s Third Congressional District was scheduled for May 13, 1997. Eric Serna was chosen as the Democratic nominee for that office on March 1, 1997. In the period leading up to that election, in which the vacant House seat was the only office on the ballot, DPNM reported making numerous disbursements in connection with both absentee ballot applications and voter identification/get-out-the-vote efforts. Pursuant to its allocation formula for paying for “mixed use” (generic voter drive and administrative costs) expenses, the party used 86% non-Federal dollars to pay for these activities. DPNM also reported making \$15.127 in coordinated expenditures pursuant to Section 441a(d). The party reported making no contributions to Serna, and Serna did not report receiving any from the party.

**C. Complaint and Responses**

**1. Voter Drive and Get-Out-the-Vote Expenses**

In its initial complaint, complainant alleges that both DPNM’s absentee ballot and its get-out-the-vote efforts during the relevant period were solely for the purpose of influencing the Federal election occurring on May 13, 1997. Complainant then outlines several disbursements

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for absentee ballot request expenses<sup>6</sup> and get-out-the-vote expenses reported in the party's Pre-Special Election Report. Following DPNM's filing of its Post-Special Election Report, complainant filed an amendment to the complaint itemizing additional disbursements from the party's Schedule H4, approximately \$104,000 of which was paid for with non-Federal funds. Complainant says these disbursements constitute exclusively Federal get-out-the-vote, voter drive and absentee ballot requests, and, accordingly, should have been paid for with money subject to the Act and its limitations. Lastly, complainant alleges, at page 2 of the amended complaint, that the alleged "expenditures were made at the request of and in close coordination with the Serna for Congress committee."

In its December 15, 1997 (i.e., first) response, DPNM acknowledges that it engaged in what it terms a "generic voter identification and get-out-the-vote effort," and argues that these are traditional party-building exercises subject to the allocation regulations. The party specifically notes that "[t]he regulations do not bar the application of the allocation regulations to a special election, and there is no requirement to apply the regulations any differently in this or any other special election." (DPNM's First Response, p. 3) (citing Explanation and Justification, 55 Fed. Reg. 26064 (June 26, 1990) (note omitted)). Further, DPNM acknowledges that "[t]he immediate catalyst for these activities may have been the May special election," but argues that the activities were allocable as "[t]he [p]arty was able, through its efforts at issue here, to

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<sup>6</sup> Complainant indicates in a footnote at page 1 that a copy of the absentee applications is attached, alleging that "[t]hey were special-election specific and could only have benefited one candidate, Eric Serna, the Democratic candidate in this special federal election." However, nothing is attached to the complaint.

dramatically expand its ability to identify and get out Democratic voters in elections in the future," *id.* at 2, and attaches an affidavit from the party's county field director to that effect.<sup>7</sup>

Serna's first response does not directly address the coordination issue. In its second response, at page 1, Serna points out that complainant "offers no evidence that anyone connected with the Serna campaign was involved in those [DPNM's GOTV] efforts" and "[i]nstead he makes a bald assertion of what his committee 'believes . . .'"<sup>8</sup>

## 2. Disbursements to Randy Dukes for Field Expenses

The Post-Special Election Report also indicates several disbursements to Randy Dukes. According to complainant, these disbursements, totaling approximately \$48,000 and reported as "field expenses, canvassing, generic," were for the purpose of influencing the May 13, 1997 special election. Thus, according to complainants, they constitute either independent expenditures (to influence the special election) or contributions to Serna. In its second response, the party reiterates, at page 2, that Duke's activities constituted generic party-building activity, and that "[t]he payments to Randy Dukes were part of Respondent's efforts to build and organize a base of voters that will be used by the [p]arty in future elections."

<sup>7</sup> DPNM also appears to argue that First Amendment considerations require that the party not be required to pay for the disbursements at issue solely with funds subject to the Act. While the precise nature of the party's constitutional argument is unclear, it appears to be that because (apparently) none of the materials presently at issue used Eric Serna's name or likeness, they are not subject to the Act as a constitutional matter. *See, e.g.*, DPNM's First Response, p. 5. ("Any attempts to restrict the Party's ability to conduct generic voter drive activities implicates directly these Constitutional [rights of free speech and association] protections.") As best as this Office can discern, DPNM does not challenge the constitutional validity of applying the Commission's allocation regulations to the spending at issue, but rather makes its constitutional argument to buttress its argument that the disbursements were properly subject to the Commission's allocation regulations. To the extent that the party argues that the First Amendment prevents the application of FECA (limits) to political parties' voter identification or get-out-the-vote efforts, the argument is misplaced. *Cf. Federal Election Comm'n v. California Democratic Party*, 13 F.Supp.2d 1031, 1036-37 (E.D. Cal. 1998) (rejection of argument that "restrictions [the Commission's allocation regulations] on voter drive activities impermissibly curtail [a political party's] First Amendment associational rights.")

<sup>8</sup> Complainant's coordination allegations are made "on information and belief."

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### 3. Earmarked Contributions

The amendment further alleges that five contributions DPNM received in April and May 1997 were earmarked for Serna. The Schedule A to DPNM's Post-Special Election Report states that each contribution is a "[r]eceipt [f]or: . . . special election 3<sup>rd</sup> C.D., NM, May 4, 1997." Complainant says that several of these contributors had already contributed to Serna and, therefore, violated the monetary limits contained in 441a(a). *See* 2 U.S.C. § 441a(a)(8).

DPNM denies that the contributions were earmarked and indicates that "[a]ll receipts were related to the [p]arty's general fundraising." (DPNM's Second Response, p. 1.) As for the fact that the party indicated on its Schedule A that the contributions were for the special elections, DPNM explains as follows:

Because Respondent is a party committee, however, it did not need to check any box in this area of the form. Its contribution limits are calculated on a calendar year, not a per election, basis. Because the Commission uses the same Schedule A form for both authorized and unauthorized committees, this irrelevant (for an unauthorized committee) information appears, confusingly, on the schedules used by the [p]arty. If the Commission would like the [p]arty to amend its schedules to remove any notation in these boxes, it would be happy to do so.

*Id.* at 2. Serna notes, at page 2 of its second response, that complainant "makes no allegation that this was done in coordination with the Serna campaign" and "makes no assertion that anyone connected with the Serna campaign even knew about these contributions."

DRIVE responds, at page 1, that "[a]s a factual matter, DRIVE's contribution was not earmarked for Mr. Serna. . . . Rather, the contribution was made to the New Mexico Democratic Party generally for its use as it saw fit."<sup>9</sup> Respondents Chavez and Wood do not explicitly address whether they directed the contributions, but explain some of the circumstances

<sup>9</sup> DRIVE's response indicates that the contribution check is attached as an exhibit to the response. However, the response contains no such check

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surrounding their contributions.<sup>10</sup> Respondent Monaldo states, at pages 1-2 of his response, as follows: "I have no idea how the NMDP used my contribution. . . . Their use of my contribution was not directed or controlled by me." Respondent Montoya indicates that his contribution "went for administrative expenses of the party in Albuquerque."

**D. Analysis**

**1. Disbursements Allocated as Administrative/Voter Drive Expenditures**

According to complainant, various disbursements between March 3 and May 12, 1997 for (1) absentee ballot applications, (2) mailers, door hangers, flyers and related printing and postage costs, (3) radio ads, (4) phone banks and telephone bills and (5) various field and voter contact expenses – reported by the party as "administrative/voter drive" expenses – were for the purpose of influencing an election for Federal office. As the absentee ballot applications were specific to the May 13, 1997 special election – at which a single (Federal) office was at issue – costs associated with those applications should constitute payments for the purpose of influencing that particular election for Federal office. The remaining disbursements are discussed below as follows. First, the party's disbursements associated with its various communications (mailers, door hangers, radio ads, telephone costs associated with phone banks, etc.) urging the public to "Vote Democratic" are discussed.<sup>11</sup> Second, the disbursements to Randy Dukes for various field expenses are discussed. Third, the issue of possible coordination between the party and Serna is

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<sup>10</sup> Chavez attached his contribution check to his response. The memo section on the check indicates that it was for "5 tickets" to a "[f]undraiser on May 15<sup>th</sup>." Wood indicates that her contribution consisted of \$36.00 worth of raffle tickets and \$75.00 for a "pizza party fundraiser."

<sup>11</sup> This Office recognizes that some of the disbursements associated with telephones may have been "normal" allocable expenses, e.g. telephone bills for party headquarters, and will take this into consideration in its subsequent recommendations regarding an appropriate civil penalty. Some of the disbursements, however, are unmistakably related to phone banks immediately prior to the special election.

discussed. Fourth, this Report discusses the possible violations arising from these disbursements.

a. Voter Drive and Get-Out-the-Vote Expenses

As provided under Section 106.5, disbursements for communications that urge the public to vote for a clearly identified candidate are not generic voter drive costs, and do not fall within the Commission's allocation regulations. Complainant has not provided the Commission with any of the specific direct mail pieces, flyers, door hangers or radio ad or phone bank scripts. The party, at pages 2-3 of its first response, describes the contents of the communications as follows: "[T]he materials addressed the reader or listener in generic party terms, such as 'vote Democratic,' 'Support the Democratic Party,['] 'It is always important to vote, and vote Democratic.'" As there was only one office at stake in the May 13, 1997 special election and only one Democrat on the ballot, the communications at issue – made immediately prior to that election – would appear to refer to the Democratic nominee in the special election for the House seat for the Third District of New Mexico, i.e., Eric Serna. Accordingly, the words "vote Democratic" in the context presented here appear to meet the definition at Section 100.22(a), and constitute express advocacy of a clearly identified candidate, Eric Serna.<sup>12</sup> Assuming that DPNM's disbursements associated with its various communications urging the public to "Vote

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<sup>12</sup> It seems reasonable to infer that DPNM's communications to "vote Democratic" also informed the public of the date of the special election, i.e., the day on which it wanted the public to "vote Democratic." Even assuming the communications did not explicitly provide the date of the special election, the relevant election occurred on May 13, 1997, eleven months before the next primary election and eighteen months from the next general election.

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Democratic” were for the purpose of influencing a Federal election, they were either independent expenditures or coordinated expenditures, i.e. contributions.<sup>13</sup>

**b. Disbursements to Randy Dukes**

The party made a series of disbursements to Randy Dukes between April 14, 1997, a month before the special election, and May 13, 1997, the day of the election itself. The party reported its disbursements to Dukes between April 14, 1997 and May 12, 1997 on its Schedule H4 (Joint Federal/Non-Federal Activity Schedule) and described them as “field expenses, canvassing, generic” or “reimbursement for canvassing, field expenses.”<sup>14</sup> It reported three payments to Dukes on May 9, 12 and 13, 1997 for “phone bank day workers’ pay” on its Schedule F as coordinated expenditures. Given that (1) the only office at issue on May 13, 1997 was a Federal one and (2) the next regularly-scheduled general election was eighteen months away, the disbursements for the voter identification and field work performed in the month immediately prior to that special election (in which the party registered and identified the voters to be turned out on election day) also appear to have been for the purpose of influencing that Federal election. In addition, the address for Dukes that the party provides on its disclosure reports is that of the Democratic Congressional Campaign Committee (“DCCC”). It seems reasonable to infer that Dukes is or was an employee of the DCCC sent to New Mexico in 1997 to help secure the election of the Democratic candidate in the only office on the ballot.<sup>15</sup> Based on the above, the disbursements to Randy Dukes may have been either independent expenditures

<sup>13</sup> The Commission’s recent analysis of its allocation regulations in AO 1998-9 – issued after the May 13, 1997 special election – is consistent with the above analysis

<sup>14</sup> The party also reports a May 15, 1997 disbursement to Dukes for “reimbursement, personal expenses.”

<sup>15</sup> In addition to apparently lending Dukes to DPNM, the DCCC also transferred \$15,997 to the party between April 3, 1997 and April 17, 1997

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or coordinated expenditures, i.e. contributions. As there is no indication that Randy Dukes himself violated the Act, this Office recommends that the Commission find no reason to believe that Randy Dukes violated the Act in connection with this matter.

c. Coordination

If the disbursements at issue resulted from coordination between Serna and the party, they would be expenditures subject to the combined limits for contributions (2 U.S.C. § 441a(a)(2)(A)) and coordinated expenditures (2 U.S.C. § 441a(d)). The available information suggests that the party and Serna may have coordinated these disbursements. Serna reports making the following disbursements to the party: (1) \$100 on February 20, 1997, i.e., the beginning of the campaign, for "field operations" and (2) \$3,000 on May 13, 1997, election day, for "phone." For its part, the party reports making \$15,127 in coordinated expenditures on behalf of Serna for "phone bank day workers' pay." This information raises a question as to whether the party and Serna may have coordinated their efforts, such as establishing some sort of rough division of labor, in the brief campaign prior to the May 13, 1997 special election.

Further, Commission regulations further provide a presumption that expenditures are coordinated if they are "[m]ade by or through any person who is, or has been, authorized to raise or expend funds, who is or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent." 11 C.F.R. § 109.1(b)(4)(i)(B). Both respondents apparently used the same consultants and shared employees during the campaign.

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The following chart illustrates this overlap in both vendors and employees:

FRIENDS of ERIC SERNA for CONGRESS

Name of Vendor/Employee	Committee's Description of Purpose	Date	Amount
A. Gutierrez & Assoc.	Radio Buys	5/6/97	\$10,977.60
A. Gutierrez & Assoc.	DCCC - TV*	5/13/97	\$4,641.12
Daniel, John	Database Input	2/24/97	\$1,000.00
Daniel, John	Database Services	3/10/97	\$1,000.00
Ning, Natasha	Payroll	5/11/97	\$1,500.00
Singleton, Helen	Mailing and Postage	4/30/97	\$500.00
Valencia, DeAnza	Get Out The Vote Expenses	4/24/97	\$200.00
Vasquez, Eric	Expenses	5/5/97	\$253.07
Vasquez, Eric	Contract Service	5/5/97	\$750.00
Vasquez, Eric	Reimburse	5/13/97	\$218.79

\*Though DPNM reports receiving several transfers from the Democratic Congressional Campaign Committee ("DCCC"), the DCCC does not report any expenditures on behalf of the Friends of Eric Serna for Congress

DEMOCRATIC PARTY of NEW MEXICO

Name of Vendor/Employee	Committee's Description of Purpose	Date	Amount
Gutierrez, Armando	Radio Ad Generic	5/12/97	\$158.34
John Daniels Consulting	Database System	4/18/97	\$3,033.50
John Daniels Consulting	Database Election Data	5/6/97	\$2,641.25
Ning, Natasha	Contract Work	2/22/97	\$500.00
Ning, Natasha	Contract Work	3/24/97	\$250.00
Ning, Natasha	Statewide Travel	4/24/97	\$147.50
Ning, Natasha	Contract Work	4/25/97	\$1,200.00
Singleton, Helen	Contract Work	5/2/97	\$500.00
Singleton, Helen	Contract Work	5/6/97	\$1,000.00
Singleton, Helen	Contract Work	5/12/97	\$1,000.00
Singleton, Helen	Re-emb Expenses	5/20/97	\$1,342.00
Valencia, DeAnza	Contract Work	4/18/97	\$75.00
Vasquez, Eric	Contract Work	5/5/97	\$500.00

Based on the above, it appears that the party may have coordinated the disbursements at issue with Serna.

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**d. Violations**

The disbursements at issue in the present matter could result in the following FECA violations.

**(1) Excessive/In-Kind Contributions**

Pursuant to 2 U.S.C. § 441a(d), the DPNM was allowed to expend \$31,810 on Serna's behalf. In addition, pursuant to 2 U.S.C. § 441a(a)(2)(A), the party was allowed to contribute \$5,000 to Serna. Thus, the party could have made \$36,810 in contributions/coordinated party expenditures to Serna and remained within prescribed limits. DPNM, however, apparently spent roughly \$210,000 in support of Serna (the \$15,127 it reported as coordinated expenditures pursuant to Section 441a(d) and the approximately \$195,000 in combined Federal/non-Federal funds for the disbursements at issue). Given the "clearly identified candidate" (Eric Serna, the only Democrat on the ballot) and the message conveyed in the communications ("vote Democratic"), coordination between the DPNM and Serna would mean that the amount spent on the communications were expenditures made pursuant to 2 U.S.C. § 441a(d). The amount spent that exceeded \$36,810 would constitute an excessive in-kind contribution pursuant to 2 U.S.C. § 441a(a)(2)(A).<sup>16</sup> Therefore, it appears that DPNM may have exceeded the Section 441a(a)(2)(A) limitations. Any excessive in-kind contribution made by the party in violation of 2 U.S.C. § 441a(a)(2)(A) would have been accepted by Serna in apparent violation of 2 U.S.C. § 441a(f). Therefore, this Office recommends that the Commission find reason to believe that

<sup>16</sup> A few of the disbursements (\$7,318.29 and \$2,040.02 for door hangers, \$609.43 for flyers and \$6,798.00 for postcards) may have involved communications that constituted campaign materials used by the party in connection with volunteer activities. See 11 C.F.R. § 100.8(b)(16). If so, though the party was required to make these expenditures entirely with funds subject to the Act, see 11 C.F.R. § 100.8(b)(16)(ii) (portion of volunteer materials allocable to Federal candidate(s) must be paid with Federal funds), these expenditures would not constitute coordinated expenditures subject to the party's combined 441a(a) and 441a(d) limits.

the Democratic Party of New Mexico—Federal and Thomas Atcitty, as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d)(3) and that Friends of Eric Serna for Congress and John Pound, as treasurer, violated 2 U.S.C. § 441a(f).

(2) **Prohibited Expenditures/Use of Non-Federal Funds**

To the extent that the activities at issue were for the purpose of influencing a Federal election (i.e., urging the public to vote for a clearly identified or specific candidate), all disbursements for these activities had to be funded entirely from funds subject to the limitations and prohibitions of the Act. The party's disclosure reports indicate that it paid for 86% of these disbursements with non-Federal funds. The State of New Mexico allows corporations and labor organizations to contribute to a political party. Indeed, respondent Monaldo, an attorney who is apparently "chartered" under Kansas law,<sup>17</sup> indicates in his response that he contributed corporate funds. Therefore, it appears that payments from the party's non-Federal account for the expenditures at issue may have been made in part with moneys which were prohibited under 2 U.S.C. § 441b. In addition, the Commission's regulation at 11 C.F.R. § 102.5(a)(1)(i) requires that payments for Federal activity be made only from a committee's Federal account. Thus, this Office recommends that the Commission find reason to believe that that the Democratic Party of New Mexico—Federal and Thomas Atcitty, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i),<sup>18</sup> and that the Democratic Party of New Mexico—Non-Federal (State) and Thomas Atcitty, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

<sup>17</sup> Monaldo is a resident of Kansas

<sup>18</sup> The Commission has found that where an organization with Federal and non-Federal accounts appears to have violated 11 C.F.R. § 102.5 by disbursing funds from its non-Federal account in connection with a Federal election, the organization, or at least its Federal committee, may have also violated 2 U.S.C. § 441b if the non-Federal account contained corporate or labor organization funds at the time of the disbursement. See MUR 4413.

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Correspondingly, this Office recommends that the Commission find reason to believe that Friends of Eric Serna for Congress and John Pound, as treasurer, violated 2 U.S.C. § 441b.

### (3) Reporting Violations

DPNM reported the expenditures at issue on its Schedule H4 as allocable “administrative/voter drive” expenditures. To the extent that these expenditures were not generic voter activity but coordinated expenditures, the party has misreported them. If the expenditures were coordinated, the party was required to report them as such.<sup>19</sup> See 2 U.S.C.

§ 434(b)(4)(H)(i), (iv) and (6)(B)(iv). Based on the above, this Office recommends that the Commission find reason to believe that Democratic Party of New Mexico—Federal and Thomas Atcitty, as treasurer, violated 2 U.S.C. § 434(b). If the expenditures were in-kind contributions to Serna, they were required to be reported as contributions made and received. 2 U.S.C.

§ 434(b)(2)(D). Accordingly, this Office recommends that the Commission find reason to believe that Friends of Eric Serna for Congress and John Pound, as treasurer, violated 2 U.S.C. § 434(b).<sup>20</sup>

### 2. Allegedly Earmarked Contributions to DPNM

Given the timing of the contributions to the party, respondents DRIVE, Chavez, Wood, Montoya, and Monaldo could have reasonably expected or believed that their contributions to DPNM would be used to benefit Serna. Nonetheless, there is no indication in the record that any

<sup>19</sup> If the expenditures were independent, DPNM was required to report these as independent expenditures and certify on Schedule E of its reports that the expenditures were not made in coordination with the candidate. See 2 U.S.C. § 434(b)(4)(H)(iii)

<sup>20</sup> All communications that expressly advocate the election or defeat of a clearly identified candidate must contain a disclaimer that both states who paid for the communication and whether or not it was authorized by any candidate or principal campaign committee of the candidate 2 U.S.C. § 441d(a). Because the party’s mailings apparently expressly advocated the election of Eric Serna, they were required to have such disclaimers. The

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of the contributors directed or controlled their contributions or took any action that might constitute a designation or instruction that the funds be spent of behalf of Serna. Indeed, the available information indicates precisely the opposite. Accordingly, this Office recommends that the Commission find no reason to believe that respondents violated the Act in connection with the contributions to DPNM from DRIVE, Fabian Chavez, Jr., Diane Wood, Joseph Montoya, or Tino Monaldo.

**III. PROPOSED DISCOVERY**

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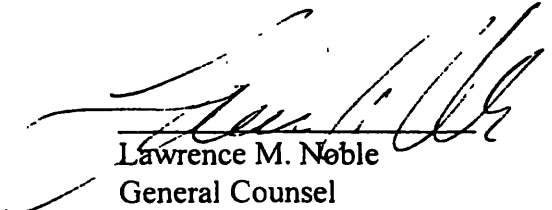
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attached discovery requests the communications. After reviewing the communications, this Office will make recommendations, if appropriate, regarding disclaimer violations.

**IV. RECOMMENDATIONS**

1. Find reason to believe that the Democratic Party of New Mexico—Federal and Thomas Atcitty, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i).
2. Find reason to believe that the Democratic Party of New Mexico—Non-Federal (State) and Thomas Atcitty, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).
3. Find reason to believe that Friends of Eric Serna for Congress and John Pound, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f), and 441b.
4. Find no reason to believe that Randy Dukes violated the Act in connection with this matter.
5. Find no reason to believe Democratic Republican Independent Voter Education Committee and Tom Sever, as treasurer; Fabian Chavez, Jr.; Diane Wood; Joseph Montoya; Tino Monaldo violated the Act in connection with their contributions to the New Mexico Democratic Party.
- 6.
7. Approve the attached Factual and Legal Analyses and the appropriate letters.

Date

  
Lawrence M. Noble  
General Counsel