



FEDERAL ELECTION COMMISSION

WASHINGTON, D C 20463

July 28, 1999

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

John B. Pound, Treasurer
Friends of Eric Serna for Congress
P.O. Box 8254
Santa Fe, New Mexico 87504

RE: MUR 4643

Dear Mr. Pound:

On June 11, 1997, the Federal Election Commission notified Friends of Eric Serna ("Committee") and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and information provided by you, the Commission, on July 20, 1999, found that there is reason to believe Friends of Eric Serna and you, as treasurer, violated 2 U.S.C. § 441a(f) and 434(b), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

You may consult with an attorney and have an attorney assist you in the preparation of your responses

If you intend to be represented by counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notification or other communications from the Commission.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in

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settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact J. Michael Lehmann, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

cc: Eric Serna

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² 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).

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.

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

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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.*

“[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).

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 expanded 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).

B. 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.

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. 2 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

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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.*

C. The Commission's Allocation Regulations

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 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

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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).

D. "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 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.

II. 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.

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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.

III. Complaint and Responses

A. 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 for absentee ballot request expenses³ and get-out-the-vote expenses reported on 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

³ 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.

complaint, that the alleged "expenditures were made at the request of and in close coordination with the Serna for Congress committee."

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 . . .'"⁴

B. 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.

IV. Analysis

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

⁴ Complainant's coordination allegations are made "on information and belief."

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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. Second, the disbursements to Randy Dukes for various field expenses are discussed. Third, the issue of possible coordination between the party and Serna is discussed. Fourth, this Analysis 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.⁵ Assuming that

⁵ 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.

DPNM's disbursements associated with its various communications urging the public to "Vote Democratic" were for the purpose of influencing a Federal election, they were either independent expenditures or coordinated expenditures, i.e. contributions.⁶

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."⁷ 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.⁸ Based

⁶ 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.

⁷ The party also reports a May 15, 1997 disbursement to Dukes for "reimbursement, personal expenses."

⁸ 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.

on the above, the disbursements to Randy Dukes may have been either independent expenditures or coordinated expenditures, i.e. contributions.

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 which exceeded \$36,810 would constitute an excessive in-kind contribution, pursuant to 2 U.S.C. § 441a(a)(2)(A).⁹ Therefore, it appears that DPNM exceeded the Section 441a(a)(2)(a) limitations. As the available information indicates that this excessive in-kind contribution was apparently accepted by Serna, there is reason to believe that Friends of Eric Serna for Congress and John B. Pound, as treasurer, violated 2 U.S.C. § 441a(f).

⁹ A few of the disbursements (\$7,318.29 and \$2,040.42 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.

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2. Reporting Violations

To the extent that the expenditures at issue 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, there is reason to believe that Friends of Eric Serna for Congress and John B. Pound, as treasurer, violated 2 U.S.C. § 434(b).

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