FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

September 24, 1999

MEMORANDUM

TO: The Commission

FROM: Lawrence M. Noble
General Counsel

BY: Lois G. Lerner
Associate General Counsel

SUBJECT: MUR 4648 – Probable Cause to Believe Report

Due to the time-sensitive nature of several of the violations addressed in the attached General Counsel's Report, this Office requests that the Commission suspend the rules in order to consider this document at the September 30, 1999 Executive Session.

Staff Assigned: Tony Buckley

Attachment
General Counsel's Report

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
New York Republican Federal Campaign Committee	)	MUR 4648
and Michael Avella, as treasurer; Jeffrey T. Buley;	)	
William D. Powers; and Arthur Bramwell[1]	)	

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter arose from a referral from the U.S. Attorney's Office in Albany, New York concerning potential reporting violations by the New York Republican Federal Campaign Committee ("the Committee") on its 1994 30-Day Post-General Report. On June 17, 1997, the Commission found reason to believe the Committee, during the 1994 election cycle, violated 2 U.S.C. § 432(h)(1) by failing to make certain disbursements by check drawn on an account at a qualified campaign depository; and violated 2 U.S.C. § 434(b)(5)(A), (6)(B)(i), (6)(B)(v), and 11 C.F.R. § 104.3(b)(3)(i), (viii), (ix), by failing to report the proper identities of recipients, and the proper purpose, of disbursements of $200 or more. Further, the Commission found reason to believe that the Committee, during the 1996 election cycle, knowingly and willfully violated 2 U.S.C. § 434(b)(5)(A), (6)(B)(i), (6)(B)(v), and 11 C.F.R. § 104.3(b)(3)(i), (viii), (ix), by improperly reporting the purpose of certain disbursements as "election day expenses." In addition, the Commission found reason to believe that Jeffrey T. Buley violated 2 U.S.C. § 432(h)(1), as it appeared at that time that he had taken the money reported as given to him and had personally distributed it to many others in the form of cash.

[1] The Committee and its treasurer, and Respondents William D. Powers and Jeffrey T. Buley, are collectively referred to herein as "the Committee Respondents."

On December 8, 1997, the Commission found reason to believe that Arthur Bramwell, the Chairman of the Kings County Republican Committee ("KCRC"), violated 2 U.S.C. § 432(h)(1) by distributing cash in amounts over $100 on behalf of the Committee, through the proceeds of a check issued by the Committee to the KCRC on November 7, 1994. The Committee was also informed at that time that the available evidence suggested that the Committee had committed additional violations of 2 U.S.C. § 434(b)(5)(A) and 11 C.F.R. § 104.3(b)(3)(i) during the 1994 and 1996 election cycles by failing to report the identities of intermediaries who were the last recipients of disbursements of over $200. In addition, certain other findings with respect to 1994 activity appeared to apply to 1996 activity as well. Specifically, with respect to 1994 activity, the Commission had found reason to believe that the Committee violated 2 U.S.C. § 432(h)(1) by making cash disbursements in excess of $100. Evidence obtained during the investigation in this matter now suggested that during the 1996 cycle Jeffrey Buley also passed along cash for the Committee in amounts of $200 or more. Thus, the Committee was informed, it also appeared that the Committee violated 2 U.S.C. § 432(h)(1) during the 1996 election cycle. As a result of receiving this information the Commission, on February 18, 1998, found reason to believe that William D. Powers violated 2 U.S.C. § 432(h)(1). At that time, the Commission approved an Order to Submit Written Answers for Mr. Powers as well as a Subpoena for Deposition.

On February 23, 1999, the Commission found reason to believe that the Committee and its treasurer knowingly and willfully violated 2 U.S.C. § 432(c)(5) and 11 C.F.R. § 102.9(b)(1), (2), by failing to keep an account of the name and address of every person to whom the Committee made a disbursement, along with the date, amount, and purpose of the disbursement, including a receipt, invoice, or canceled check for each disbursement in excess of $200. Also on

February 23, 1999, the Commission determined to enter into conciliation with all the above-mentioned Respondents and approved a proposed conciliation agreement. On July 22, 1999, the Commission rejected the final proposed conciliation agreement of the Committee Respondents. On September 2, 1999, the General Counsel's Briefs were mailed to the Committee Respondents and to Arthur Bramwell.

The Committee Respondents filed a request for an extension of time to respond to the General Counsel's Brief on September 13, 1999. The Commission rejected this request on September 17, 1999. The Committee Respondents timely filed their responsive brief on September 22, 1999. No responsive brief was received from Arthur Bramwell.

II. ANALYSIS (The General Counsel's Briefs dated September 2, 1999 are incorporated herein by reference)

A. The Committee Respondents

Respondents claim that "[t]o the very best of their understanding of federal election law in 1994 and 1996," they "attempted to comply" with the applicable disbursement, recordation, and reporting requirements of the Act is not credible. They assert that they "could not imagine that the Act actually contemplated explicit documentation of nominal expenditures made to thousands of volunteers scattered across a city of nearly 9 million people," Respondents' Brief at 14, when the clear language of the statute and regulations requires that they keep such information. *See* 2 U.S.C. § 432(c)(5) and 11 C.F.R. § 102.9(b)(1), (2).

Respondents also attempt to argue that the "context" in which they acted somehow justifies their failure to comply with the law. Even within that "context", Respondents could

have paid poll-watchers nominal amounts for food, transportation and day care at the end of a documented paper trail of disbursements, as is required by the Act and the regulations. Indeed, the proper "context" in which to evaluate Respondents' conduct is by comparing their actions in the 1993 non-federal New York City mayoral election, discussed in the General Counsel's Brief at 4-5 and 12, but completely ignored by Respondents in their brief, to their conduct in 1994 and 1996. The conclusion that the Respondents could have complied with the law and paid pollwatchers, as they did in 1993, stands.

In making their arguments, Respondents mischaracterize the General Counsel's theories of liability in order to suggest that the General Counsel has deficient proof of Respondents' violations, or has impermissibly shifted the burden of proof to Respondents. Thus, Respondents identify the "gravamen" of this matter as Respondent Buley's disbursement of Party funds to Respondent Powers and Respondent Powers disbursement of those funds in smaller increments to others. Respondents' Brief at 6. However, the General Counsel's Brief does not challenge the transmittal of funds through a chain of persons to poll-watchers, assuming that is where the funds ended up. Rather, the gravamen of the offense was the Respondents' failure to disburse funds in accordance with the clear disbursement, recordation and record-keeping requirements of the law, and their filing of false and misleading information with the Commission suggesting that the listed individuals were *bona fide* recipients of the Party's funds, rather than the mere conduits they actually were.

Further, Respondents attempt to distort this Office's position by arguing that this Office is suggesting that all of the 10,000 pollwatchers who received funds should have been reported on the Committee's disclosure reports. Respondents state that "the General Counsel's Brief at 11 attempts to make much of the fact 'the true recipients' of the funds were not on the public record.

Of course, the Brief never addresses its own narrative of the law, General Counsel's Brief at 2-3, acknowledging that disbursements of less than $100 are not required to be reported publicly." Respondents further suggests that "the basic funding assumption on which the poll watcher program was predicated - the law prohibits cash disbursements in excess of $100 to any poll watcher - was correctly and consistently identified by Respondents as a guiding tenet of the program."

Contrary to their argument, this Office has never suggested that persons at the end of the chain of distribution, assuming they received cash of less than $100, had to be reported, or had to have received their disbursement in the form of a check.[3] Rather, this Office has consistently argued that persons to whom disbursements were made in excess of $200, persons to whom, for example, Mr. Powers gave cash in amounts ranging from a couple of hundred dollars to a couple of thousand dollars in 1994, *see* Powers Deposition Transcript at 15, should have received their disbursements in the form of checks and their identities should have been reported on Committee reports.[4] The law regarding cash disbursement in excess of $100 applies to all persons, not just poll watchers.

Respondents repeat the statement by Mr. Buley, acknowledged in the GC Brief at 12, that he had concluded that "the best system for disbursing the funds to the volunteers was to have checks cut by [the Committee] to a number of individuals." However, Respondents have not

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[3] Indeed, it is only disbursements of $200 or higher which are required to be reported. See 2 U.S.C. § 434(b)(5). Disbursements of $100 or more must be made by check on a committee account at a campaign depository. See 2 U.S.C. § 432(h)(1), (2). Thus, disbursements of $200 or more must be made by check, and must be reported on committee reports.

[4] As this Office notes in the GC Brief at 10 and 12, Respondents should have disbursed funds as they did in the 1993 New York City mayoral election, where they issued checks to local Party officials, who then apparently disbursed funds to pollwatchers. Respondents' brief never explains the difference in the operating procedure between 1993, and 1994 and 1996.

explained why this conclusion makes any sense, or why it is at all germane to the Committee's reporting obligation.

Regarding the failure to properly report the purpose, Respondents' arguments evidence a fundamental misconception of the purpose of disclosure laws. Respondents, at page 9 of their brief, state that

> [w]hile not technically a correct description, the Party did report the total amounts involved and did report them as "Election Day Activities." [sic] This may be incorrect reporting. But the General Counsel's Brief does not - as it cannot - say how this reporting hides the disbursement of the total amount involved. Nor does the Brief bother to explain why the Party would care if these small disbursements were reported. In other words, technical reporting may have been overlooked, but if the total amount was put on the public record as "Election Day Activities", the important paper trail, General Counsel's Brief at 13, exists.

Not only is the reported purpose "not technically a correct description," it is specifically prohibited by Commission regulation.[5] 11 C.F.R. § 104.3(b)(3)(i)(B). And while the total amount was reported, the reports was incorrect as to the identities of persons receiving disbursements and the amounts of disbursements received by these persons.

In an attempt to shift the blame from themselves, Respondents allot undue significance to an alleged discussion between Mr. Buley and a RAD staffperson. Respondents' Brief at 9-10. In his deposition, Mr. Buley admitted that he did not know to whom he had talked, that he had no notes of the conversation, and that he was not even sure if the individual worked in RAD or the

[5] Although Respondents' brief describes the stated purpose as "Election Day Activities," the Committee's reports, the Commission's regulations and the General Counsel's Brief all use the phrase "election day expenses."

Commission's Information Division. Buley Deposition at 35. Moreover, RAD has no evidence that the actual intermediaries were ever a part of any discussion with any representative of the Party – and Respondents never say they were – nor even that a RAD analyst spoke to Mr. Buley about the matters here in issue between the 1994 and 1996 elections. Thus, Mr. Buley's assertions regarding the substance of this conversation are not credible.

While Respondents' brief does not explain why obviously unlawful activity was in fact legitimate, it attempts to muddy the waters so as to make their conduct not appear knowing and willful. Illustrative of this purpose is Respondents' charge that, "[i]f it had wanted to prove this case (rather than make unsubstantiated conclusions), the General Counsel's investigation would have had to find individuals who received more than $100. Of course, the 'investigation' fails to do this, and so fails to meet its burden." The reason this Office could not locate all the individuals who received more than $100 is because Respondent did not maintain any records as to whom the money was disbursed, as required by law. Of course, in order to prove the violations in this case, this Office does need to prove to whom the funds were ultimately disbursed. Indeed, by their own admission, Respondents did disburse amounts to individuals exceeding $100. *See* General Counsel's Brief at 7, 9.

The real crux of this case is that by failing to document to whom the funds went, as required by law, the Respondents created the situation which the laws were designed to prevent -- the untraceability of Committee funds. In that regard, Respondents do not present any facts or law that contradict or undermine those set forth in the General Counsel's Brief, and in addressing this Office's arguments, they focus on the quantity, rather than the quality, of the evidence uncovered by this Office. It is true that the bulk of this case was established through the testimony of Respondents Buley and Powers and interrogatory responses; however, these

materials not only described conduct that violated the Act and regulations, but also demonstrated, through their discussions of how money was disbursed why this Office was unable to pursue additional evidence. As the General Counsel's Brief notes at page 7, "Mr. Powers did not have a list of people to whom he disbursed money, nor were any records kept of the individuals to whom he disbursed money. No receipts were obtained from individuals who received money. Mr. Powers understood that the individuals to whom he disbursed funds were later to distribute it to others. Mr. Powers did not know to whom the money was ultimately to be distributed." (Citations to Mr. Powers' deposition testimony and his response to Commission Order omitted).

Based on the passage quoted above, Respondents' statements or suggestions throughout their brief that the record is uncontroverted in demonstrating that William Powers turned over the cash entrusted to him to field operatives of the Party, and that these field operatives then turned the cash over to poll watchers, are simply not credible. *See, e.g.,* Respondents' Brief at 6, 8 and 11. As noted, Mr. Powers' does not support this conclusion and no documentary evidence exists which would establish its validity.

Having failed to justify their serious violations of law, notwithstanding labeling them as "technical" violations, Respondents claim that this Office has not established that their actions were "knowing and willful." To the contrary, the evidence is overwhelming. The General Counsel's Brief showed that Respondents knew how to comply with the law (albeit State) as they had done so in 1993; that they deliberately used conduits to start the disbursement process and that these conduits were the persons listed in their Commission filings as the recipients of the funds when the Respondents knew that this information was false, misleading, and a violation of both the letter and the spirit of the law; that the Respondents failed to comply with the clear rules for disbursement, recordation, and recordkeeping of Party funds, creating a situation where tens

of thousands of dollars cannot be accounted for; and that Respondent Buley's explanation for the initial disbursement followed was confusing and completely uncorroborated by the banks he claimed to have spoken to. Moreover, Respondents' defenses -- an understanding of the law that is not credible; a "context" that explains nothing; a claim of reliance on a RAD analyst after the 1994 activity that is unsupported; and, their argument that the Commission has not proven that poll-watchers received more than nominal amounts when their conduct made proof of who received what amounts completely unavailable to this Office, and more importantly, to the public – do nothing to undercut the position that the violations were knowing and willful.

Accordingly, this Office recommends that the Commission find probable cause to believe that the New York Republican Federal Campaign Committee and Michael Avella, as treasurer, knowingly and willfully violated 2 U.S.C. §§ 432(c)(5), (h)(1) and 434(b) and 11 C.F.R. §§ 102.9(b)(1), (2) and 104.3(b); and that William D. Powers and Jeffrey T. Buley each knowingly and willfully violated 2 U.S.C. § 432(h)(1).

B. Arthur Bramwell

As noted above, Mr. Bramwell has not responded to the analysis in the General Counsel's Brief issued to him on September 2, 1999.

Accordingly, this Office recommends that the Commission find probable cause to believe that Arthur Bramwell violated 2 U.S.C. § 432(h)(1).

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

IV. RECOMMENDATIONS

1. Find probable case to believe that New York Republican Federal Campaign Committee and Michael Avella, as treasurer, knowingly and willfully violated 2 U.S.C. §§ 432(c)(5), (h)(1) and 434(b) and 11 C.F.R. §§ 102.9(b)(1), (2) and 104.3(b); and that William D. Powers and Jeffrey T. Buley each knowingly and willfully violated 2 U.S.C. § 432(h)(1).

2. Find probable cause to believe that Arthur Bramwell violated 2 U.S.C § 432(h)(1).

3. Approve an admonishment letter for Arthur Bramwell.

4. Approve the attached conciliation agreement and appropriate letter for the New York Republican Federal Campaign Committee and Michael Avella, as treasurer; William D. Powers; and Jeffrey T. Buley.

9/23/99
Date

LM Noble (JPB)
Lawrence M. Noble
General Counsel

Attachments:
1. Conciliation Agreement

Staff assigned: Tony Buckley