



FEDERAL ELECTION COMMISSION

Washington, DC 20463

March 9, 1999

Edward J. Groarke, Esquire
Colleran, O'hara & Mills
1225 Franklin Avenue
Suite 450
Garden City, NY 11530

RE: MUR 4686
New York State AFL-CIO

Dear Mr. Groarke:

On February 23, 1999, the Federal Election Commission found reason to believe that your client, the New York State AFL-CIO, violated 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act of 1971, as amended ("the Act."), in connection with the endorsement of Eric Vitaliano on its Internet site. However, after considering the circumstances of this matter, the Commission also determined to take no further action and closed its file. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. In addition, on the same date, the Commission found no reason to believe that your client violated 2 U.S.C. § 441b and 11 C.F.R. § 114.3(b) in connection with the mailing that endorsed Eric Vitaliano.

The Commission reminds your clients that the making of contributions or expenditures by labor organizations in connection with an election to any political office is a violation of 2 U.S.C § 441b. Your client should take steps to ensure that this activity does not occur in the future.

The confidentiality provisions at 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record before receiving your additional materials, any permissible submissions will be added to the public record upon receipt.

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If you have any questions, please contact Eugene H. Bull, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "Scott E. Thomas", with a stylized, cursive script.

Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis
General Counsel's Report

99-04-391-0962

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: New York State AFL-CIO

MUR: 4686

I. GENERATION OF THE MATTER

This matter was generated by a complaint filed with the Federal Election Commission by the National Republican Congressional Committee ("NRCC") through its Executive Director, Ted Maness. See 2 U.S.C. § 437g(a)(1). The complaint alleges that Eric Vitaliano for Congress and Judith C. Bello, as treasurer (the "Vitaliano campaign") "received tens of thousands of dollars in unlawful, undisclosed soft money contributions" from the New York State AFL-CIO ("NYS AFL-CIO") in connection with the 1997 special election in New York's 13th Congressional District. According to the NRCC, the NYS AFL-CIO's "soft money contributions" were in the form of Internet communications that were "suspiciously similar to campaign pieces" of the Vitaliano campaign, and mailings that made false statements about Eric Vitaliano's opponent while expressly advocating Vitaliano's election to Federal office. The NRCC also alleges that the mailings were disseminated beyond the NYS AFL-CIO's membership and that expenditures in connection with the mailings were not reported to the Commission.

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II. FACTUAL AND LEGAL ANALYSIS

A. Response

The NYS AFL-CIO's response requests that the NRCC's complaint be dismissed because it fails to comply with relevant filing procedures pursuant to the Federal Election Campaign Act of 1971, as amended (the "Act") and the Commission's regulations. The NYS AFL-CIO's response also answers the substantive allegations raised by the NRCC in its complaint.

According to the response, the NYS AFL-CIO maintains a site on the Internet dedicated solely to providing information to the members of its affiliates. The monthly cost of maintaining the site is \$175. The Unity newsletter, where the information on Eric Vitaliano referenced in the complaint appeared, represents only a portion of the site.

The response states that the Unity newsletter, a print publication that is normally distributed on a monthly basis to NYS AFL-CIO affiliates only, was placed on the Internet because the Internet provides a more cost effective means of distribution to the individual members of affiliates. The response asserts that the newsletter cannot be easily accessed—a user must click through several menu options before accessing the newsletter.

The NYS AFL-CIO contends in the response that the September 1997 issue of Unity that contained the information about Vitaliano was not placed on the Internet purposely to advocate for the candidate. The newsletter purportedly contained other articles of general interest to the NYS AFL-CIO's affiliates. The NYS AFL-CIO claims the newsletter was removed from the site after approximately one week—the same day the organization became aware that the newsletter possibly violated the Act. The NYS AFL-CIO denies that the article about Vitaliano in the newsletter was "suspiciously similar" to materials of the Vitaliano campaign and asserts that the article was written entirely by its public relations officer.

With respect to the mailings referenced in the complaint, the NYS AFL-CIO denies that these were mailed to other than the local members of its affiliates. It asserts that the mailing lists were obtained through the Committee on Political Education ("COPE") which is an NYS AFL-CIO affiliate that compiles mailing lists solely from the membership of AFL-CIO affiliates.

While the NYS AFL-CIO acknowledges that the mailings contained terms of express advocacy, it argues correctly that such mailings were not prohibited by the Act to the organization's restricted class and contends that any receipt of the mailings outside its restricted class was inadvertent and *de minimis*. Finally, the NYS AFL-CIO states its intention in the December 1, 1997 response to comply with a January 1, 1998 filing date for reporting the expenditures on the restricted class mailings pursuant to the Act.

The Vitaliano campaign also submitted a response that requests dismissal of the NRCC's complaint on the grounds that it is lacking in evidence and without merit. The campaign asserts that it did not have prior knowledge of any of the activity referenced in the complaint, "did not discuss these activities with the union, did not participate in the planning, preparation, targeting or dissemination of any of the materials or information cited by the complaint," and denies that it controlled or coordinated any of these activities. Two sworn affidavits by the Vitaliano campaign's treasurer and assistant treasurer are submitted with the response in support of these assertions.

B. Applicable Law

The Act prohibits labor organizations from making any contribution or expenditure in connection with Federal elections. 2 U.S.C. § 441b. Contributions include direct or indirect payments or gifts of money or any services, or anything of value, to any candidate for Federal office. 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.1(a)(1). This general prohibition has an

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exception that allows a labor organization to communicate with its restricted class, but not the general public, on any subject including messages containing express advocacy of the election or defeat of Federal candidates. 2 U.S.C. § 441(b)(2)(A), 11 C.F.R. §§ 114.1(j) and 114.3(a). See also *United States v. United Auto Workers*, 352 U.S. 567 (1957) and *United States v. Congress of Industrial Organizations et al.*, 335 U.S. 106 (1948). For the purposes of these communications, the restricted class of a labor organization includes its membership. *Id.* Disbursements for communications expressly advocating the election or defeat of one or more clearly identified candidate(s) made by a labor organization to its restricted class shall be reported in accordance with the applicable sections of the Commission's regulations. 11 C.F.R. § 114.3(b).

Communications containing express advocacy which may be made to the restricted class include, but are not limited to, publications. Printed material expressly advocating the election or defeat of one or more clearly identified candidate(s) or candidates of a clearly identified political party may be distributed by a labor organization to its restricted class provided that: (i) the material is produced at the expense of the labor organization, and (ii) the material constitutes a communication of the views of the labor organization, and is not the republication or reproduction, in whole or in part, of any broadcast, transcript, or tape or any written, graphic, or other form of campaign materials prepared by the candidate, his or her campaign committee, or their agents. A labor organization may, under this section, use brief quotations from the speeches or other materials of a candidate that demonstrates the candidate's position as part of the labor organization's expression of its own views. 11 C.F.R. § 114.3(c)(1)(i) and (ii).

A labor organization may also endorse a candidate and communicate the endorsement to its restricted class through the publications described above or during permissible candidate

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appearances, as otherwise described in 11 C.F.R. § 114.3(c)(2). However, Commission regulations provide that no more than *de minimis* number of copies of the publication, which includes the endorsement, may be circulated beyond the restricted class. 11 C.F.R. § 114.4(c)(6). In Advisory Opinion ("AO") 1984-23, the Commission permitted an incorporated trade association to include information about its presidential endorsement in its biweekly newsletter when less than 1% of the copies were distributed to non-members, but the same information could not be published in its monthly magazine because a much larger percentage (13.7%) of the copies went to non-members. In AO 1997-16, the Commission determined that because of general availability of access to the Internet, the posting of a list of endorsements on an incorporated environmental group's web site would be considered a form of communication to the general public and thus a prohibited expenditure, unless access to such information was somehow restricted to the group's members.

A labor organization may publicly announce an endorsement, and state the reason or reasons for it, through a press release or press conference, or both. Disbursements for the press release or press conference must be *de minimis*. 11 C.F.R. § 114.4(c)(6)(i). The disbursements will be considered *de minimis* if the press release and notice of the press conference are distributed only to the representatives of the news media that the labor organization customarily contacts when issuing non-political press releases or holding press conferences for other purposes. *Id.* In addition, the public announcement of the endorsement may not be coordinated with the candidate or candidate's authorized committee(s). 11 C.F.R. § 114.4(c)(6)(ii).

C. Analysis

The NYS AFL-CIO is a "membership association" and the members of its local affiliates constitute "members" for purposes of the Act and Commission regulations.

See 11 C.F.R. § 114.1(e). As such, the members are considered part of the NYS AFL-CIO's restricted class and may receive communications from the organization on "any subject," including messages containing express advocacy. See 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(j) and 114.3(a). Accordingly, the NYS AFL-CIO was generally permitted to communicate its endorsement of Eric Vitaliano in the aforementioned special election to its restricted class.

However, the NRCC's complaint alleges that the NYS AFL-CIO's mailings, and separately, its Internet site did not meet the regulatory standards for communications to its restricted class. First, the complaint by asserting that the NYS AFL-CIO's "Internet propaganda [was] suspiciously similar to campaign pieces of the Vitaliano campaign" suggests that the NYS AFL-CIO either coordinated its Internet communication with the Vitaliano campaign or otherwise improperly republished or reproduced the materials of that campaign. The complaint also asserts that the NYS AFL-CIO's mailings were disseminated beyond its restricted class, and that the foregoing allegations resulted in "tens of thousands of dollars" in unlawful, undisclosed soft money contributions to the Vitaliano campaign. These claims are made without substantiation, and the Commission has found nothing in the public record (including newspaper articles) to support the allegations made in the complaint. Thus, the related denials in the responses, and the detailed information provided by the NYS AFL-CIO to counter the allegations in the complaint, are more concordant with the overall factual record.

In particular, there is no evidence to contradict the NYS AFL-CIO's assertion that the mailings in question were only sent to the local members of its affiliates. The NYS AFL-CIO also provided persuasive evidence that the COPE mailing list that was used included the names of members of its affiliates only, that the mailings only went to the local members of the NYS

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AFL-CIO affiliates, and therefore, the mailings were not disseminated beyond its restricted class as suggested by the NRCC. Further, while the complaint suggests that the information about Eric Vitaliano on the NYS AFL-CIO's web site was "suspiciously similar to campaign pieces of the Vitaliano campaign," there is no allegation or evidence that the same is true of the mailings at issue. Absent such additional specific information, the Commission concludes that the NYS AFL-CIO's mailings were sent to its restricted class only, and communicated the organization's endorsement of Eric Vitaliano for Federal office pursuant to 2 U.S.C. § 441(b)(2)(A) and 11 C.F.R. § 114.3(c). Thus, there is no reason to believe that the mailings violated 2 U.S.C. § 441b. Further, the NYS AFL-CIO reported the expenditures made in connection with the mailings at issue in a report filed with the Commission on December 4, 1997, a filing date that was compliant with the reporting requirements placed on labor organizations making restricted class expenditures. See 11 C.F.R. §§ 100.8(b)(4) and 104.6. Accordingly, there is no reason to believe the NYS AFL-CIO violated 2 U.S.C. § 441b and 11 C.F.R. § 114.3(b) in connection with the expenditures made on the mailings.

On the other hand, the Commission found reason to believe that the NYS AFL-CIO violated the Act in connection with the information about Eric Vitaliano that appeared on its web site. Currently, the NYS AFL-CIO's web site is available to any member of the general public with a web browser installed on a computer with access to the Internet. The web site can be readily accessed through several generally available search engines by entering the organization's name or abbreviation into the search engine or it can be accessed directly by

entering its URL¹ (<<http://www.nysaflcio.org/about.htm>>) into the "Location" or "Address" section of the web browser. Once the Internet user accesses the home page of the NYS AFL-CIO web site, that user can view all of the documents linked to that page, including the Unity newsletter. The information at issue in the Unity newsletter, *inter alia*, included the following statements:

- "On September 30th, hundreds of union members turned out for Labor's Kick-Off Rally in support of Eric Vitaliano's candidacy for Congress . . . The rally jump-started labor's efforts in support of Assemblyman Vitaliano."
- "Vitaliano has a 100% pro-labor voting record. His opponent, 32-year old Republican City Councilman Vito Fossella, has three years experience in the City Council. Fossella, a political extremist, plans to vote with Newt Gingrich on major issues. After carefully examining their records, the New York State AFL-CIO believes Eric Vitaliano will serve working families the best. You decide. Then vote on November 4th."

The statements communicate the NYS AFL-CIO's endorsement of Vitaliano's candidacy. They clearly identify Vitaliano as the NYS AFL-CIO's candidate of choice. They speak favorably of Vitaliano's voting record; identify his opponent, by name, as a political extremist; and encourage the reader to vote on election day. Such statements urge the election of Eric Vitaliano, and thus, expressly advocate his candidacy for Congress. While a labor organization may publicly announce endorsements pursuant to 11 C.F.R. § 114.4(c)(6)(i), there is no claim by the NYS AFL-CIO that the regulation was followed in this instance, and indeed it was not followed. The NYS AFL-CIO's contention that endorsement information on the web site was not easily

¹ A "URL" or Uniform Resource Locator, is the standard way of specifying the location of resources on the Internet that are part of the World Wide Web. See MICROSOFT PRESS COMPUTER DICTIONARY at 487 (3d ed. 1997).

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accessible to the public and involved *de minimis* costs has greater import as mitigation given that the web site endorsement was not a restricted class communication.

As noted in the applicable law section, the Commission stated in AO 1997-16 that an organization which endorses candidates via a web site does so publicly—"because of general availability of access to the Internet"—unless the organization takes steps to limit access to the web site to only its restricted class.² In this instance, no steps were taken to screen out non-members from the relevant portions of the NYS AFL-CIO's web site where the organization communicated its endorsement of the Vitaliano campaign. Thus, the endorsement resulted in a prohibited expenditure by the NYS AFL-CIO in violation of the Act. Accordingly, there is reason to believe that the NYS AFL-CIO violated 2 U.S.C. § 441b when it endorsed the candidacy of Eric Vitaliano via a public medium.

² In footnote twelve of AO 1997-16 the Commission stated, "For example, each member could be provided with an individual, unique identification number or password to enter the portion of the web site containing the endorsements."