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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4719
New Jersey Republican State Committee and	)	
H. George Buckwald, as treasurer	)	

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by Renee Steinhagen, Executive Director of the Public Interest Law Center of New Jersey. The basis of the complaint was the New Jersey Republican State Committee's miscalculation of the ballot composition ratios to be applied to allocate shared administrative and generic voter drive expenses during 1996, and the resulting overfunding of its federal account from its nonfederal account. On June 9, 1998, the Commission found reason to believe that the New Jersey Republican State Committee and H. George Buckwald, as treasurer ("the Committee"), violated 2 U.S.C. §§ 441a and 441b and 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i) in connection with the calculation of its 1995 and 1996 ballot composition ratios.

After receiving two extensions of time, the Committee submitted a response dated July 30, 1998, which largely reiterated the points raised in its November 5, 1997 response to the complaint. The Committee also renewed its request, previously rejected at the reason to believe stage, that the Commission dismiss this matter. This Office, by letter dated August 4, 1998, advised the Committee that "[a]s your July 30, 1998 response adds nothing to the record that was previously before the Commission when it made its reason to believe finding, there appear to be insufficient grounds for this Office to advise the Commission, as you requested, that the

Commission dismiss the Complaint in this matter." The Committee opted not to pursue pre-probable cause conciliation. See the General Counsel's Report dated August 21, 1998.

Thereafter, this Office mailed the Committee a brief dated August 27, 1998 ("General Counsel's Brief"). The General Counsel's Brief recommended that the Commission find probable cause to believe that the Committee violated 2 U.S.C. §§ 441a and 441b and 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i). After receiving an extension of time, the Committee submitted what it characterized as a "letter brief" dated October 5, 1998 ("Committee's Brief").

This report addresses the arguments presented in the Committee's Brief, renews the recommendations made in the General Counsel's Brief, and recommends approval of a proposed conciliation agreement.

II. ANALYSIS

(The General Counsel's Brief dated August 27, 1998 is incorporated herein by reference.)

A. Introduction

The Committee's Brief focuses on the inclusion, in its 1996 Schedule H1 ballot composition ratio, of one point each for the offices of State Senator and State Representative.[1] Basically, the Committee contends that it had a "good faith" belief that it was entitled to include these nonfederal points, and that in instances of good faith miscalculations, the Commission has

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[1] This Office notes that the Committee has not addressed in its Brief the following other matters involved in the Commission's reason to believe finding and raised in the General Counsel's Brief. First, this matter also involves the Committee's miscalculation of the ballot composition ratio for its shared administrative expenses during 1995, as well as its failure to use the same ballot composition ratio for shared administrative expenses for both years of the election cycle as required by 11 C.F.R. §106.5(d)(2). The General Counsel's Brief also contained a breakdown of the derivation and amounts of the nonfederal overpayments which this Office believes resulted from the Committee's violations. See General Counsel's Brief at pp. 5-6, 11-12, footnote 7 and the Attachment. As to these matters, this Office relies on the General Counsel's Brief and the absence of any responsive arguments by the Committee.

permitted transfers between the nonfederal and federal accounts within 30 days to reflect the proper ratio. In any event, the Committee argues that based on advice it allegedly received from one of the Commission's Reports Analysis Division ("RAD") analysts, the Commission is barred by estoppel from "assessing any violation." In a final attempt to avoid liability, the Committee asserts that the ballot composition ratio set forth at 11 C.F.R. § 106.5(d) is unconstitutional. This Office addresses the Committee's contentions below.

B. The Committee Miscalculated its Ballot Composition Ratio in 1996, and the Record Does Not Support the Committee's Claimed "Good Faith"

1. The Advisory Opinions Cited by the Committee Do Not Support its Position

The Committee relies on the Commission's conclusions in AOs 1991-6 and 1991-25, which required committees to include federal points in their ballot composition ratios to correspond with special elections for U.S. Senate seats. See Committee's Brief at pp. 4-5, 7-8. However, as explained in the General Counsel's Brief at pp. 9-10, the Commission's conclusion in AO 1991-6 was based on the fact that each U.S. Senate seat was on all the ballots in the state, and the average voter would have the opportunity to vote for candidates for each office. Therefore, including a federal point for that seat was in accordance with the "average ballot" concept underlying the ballot composition method. AO 1991-6 at p. 5. The Commission's rationale in AO 1991-6 not only fails to support the inclusion of nonfederal points in instances involving special elections in single legislative districts, it supports the opposite result. By ignoring the Commission's analysis in AO 1991-6 and this Office's discussion of that analysis in its Brief, including its relevancy to AO 1991-25, the Committee's reliance on those two advisory opinions is misplaced.

2. The Referenced Communications Do Not Support the Committee's "Good Faith Belief"

The Committee states that its "good faith belief that it was entitled to allocation of one point for the 8th District Senate seat to replace deceased Senator Haines and one point for the 21st District seat to replace Assemblyman Lustbader. . . was buttressed by [the Committee's] conversation and correspondence with the Commission." Committee's Brief at p. 2. However, neither of these alleged contacts support the Committee's claims.

a. The correspondence

The referenced correspondence is a January 24, 1996 letter from Charlene Hooker, Director of Operations, addressed to a RAD analyst, which was included with the Committee's November 5, 1997 response to the complaint. The letter asks the analyst to review the Committee's Schedule H1 and the allocations and "confirm that we are indeed using the correct years." According to the attached "Certification of Charlene Hooker" ("Certification"), she did not receive a written response to her letter. During the Executive Session on June 9, 1998, when the Commission made reason to believe findings in this matter, a RAD representative stated that the analyst to whom the letter was addressed did not recall receiving it, nor is the letter on the Public Record. Notably, Ms. Hooker claims no attempt to follow up her request for confirmation. Silence in the face of a request for a response is no basis for reliance. In any event, the correspondence seeks no advice regarding the points assigned to the State Senator and State Representative categories. Most significantly, since both Senator Haines and Assemblyman Lustbader died after January 24, 1996, that correspondence obviously could not "buttress" the Committee's asserted belief that it was entitled to count those nonfederal points.

b. The conversation

In her Certification, Ms. Hooker states that on March 18, 1996, she spoke with a RAD analyst "who confirmed that we could take the 'extra' point for deceased Senator Haines which resulted in the 'special' election. She confirmed that we were using the correct allocation." However, information exists that undermines the credibility of Ms. Hooker's statement. First, Senator Haines did not die until December 1996. Second, the RAD analyst to whom Ms. Hooker spoke denies that a conversation on the allocation topic occurred.

The Factual and Legal Analysis notified the Committee that the Commission was aware that the alleged phone conversation preceded Senator Haines's death and that a dispute existed concerning the content of the Committee's conversation with the RAD analyst. See the First General Counsel's Report, Attachment 3, n. 11. However, the Committee does not address these issues in its brief.[2] Based on the timing of the conversation, this Office notes that Ms. Hooker possibly could have meant to write Assemblyman Lustbader rather than Senator Haines. Nevertheless, the dispute as to the content of the conversation concerns not which individual was discussed, but whether there was any discussion at all regarding allocation matters.

This Office has spoken with the analyst, who recalls the March 18, 1996 conversation with Ms. Hooker. The analyst was not assigned to the Committee, but returned the call as the assigned analyst was unavailable. According to the analyst, the conversation concerned two Requests for Additional Information ("RFAIs") sent to the Committee on March 6, 1996,

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[2] While the Committee says in one place in its brief that it was given advice during the conversation, this Office notes that in describing the conversation in the estoppel portion of its brief, the Committee speaks in terms of it not being informed that its "framework" or "point allocation" was "in error" or was "inappropriate," instead of the affirmative statement contained in the Certification. Committee's Brief at pp. 2 and 5.

regarding 1995 Quarterly Reports. Specifically, Ms. Hooker questioned a reference to Schedule A in one report and an issue involving direct candidate support reflected on a Schedule H4 in another. The analyst states that the conversation did not include any discussion regarding Schedule H1 or ballot composition ratio matters. Thus, the Committee's claim that its "good faith belief" "was buttressed by the . . . conversation," is, at best, disputed, and at worst, lacking in credibility.

C. The Commission is Not Barred by Estoppel from "Assessing any Violation" Based on the Purported Telephone Conversation

Assuming arguendo that a relevant conversation occurred, that would not estop the Commission from pursuing this matter against the Committee.[3] In making its estoppel argument, the Committee does not present the applicable legal precedent.

The Committee relies on two estoppel cases involving private litigants. See Committee's Brief at pp. 5-6. However, the government may not be estopped on the same terms as other litigants. Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1990).[4] As a general rule, equitable estoppel is rarely valid against the government, and the party asserting estoppel has a "heavy burden." Linkous v. United States, 142 F.3d 271, 277 (5th Cir. 1998). The

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[3] Even if the Committee's estoppel argument had any conceivable merit, the Committee failed to comply with 11 C.F.R. § 106.5(d) in respects other than the inclusion of the disputed points, and, therefore, a probable cause finding in this matter is appropriate.

[4] Notably, whether the doctrine of estoppel can apply to the United States remains an open issue. See Richmond, 496 U.S. at 422-423 (stating that the Court had summarily reversed every finding of estoppel against the government brought before it). See also Lord v. Babbit, 991 F. Supp. 1150, 1162, n. 1 (D. Alaska 1997) (stating that "whether this doctrine can apply to the United States is an issue which has not yet been decided"); and Dazzle Mfg., Ltd. v. U.S., 971 F. Supp. 594, 597 (Ct. Int'l Trade 1997) (stating that "it is uncertain when, if ever, a claim of equitable estoppel can lay against the government").

government estoppel claimant, in addition to the four traditional claims of estoppel,[5] must prove the following two additional elements: (1) that the government agent engaged in affirmative conduct going beyond mere negligence; and (2) that the act will cause serious injustice and the imposition of estoppel will not unduly harm the public interest. S & M Investment Co. v. Tahoe Reg'l Planning Agency, 911 F.2d 324, 329 (9th Cir. 1990).

For actions of a government agent to constitute "affirmative misconduct," the agent, "at a minimum, must intentionally or recklessly mislead estoppel claimant." United States v. Marine Shale Processors, 81 F.3d 1329, 1350 (5th Cir. 1996). Proof of affirmative misconduct "requires an affirmative misrepresentation or affirmative concealment of a material fact by the government." Linkous, 142 F.3d at 278. Moreover, estoppel claims against the government based on oral advice are particularly disfavored. See, e.g., United States v. Van Horn, 20 F.3d 104, 112 (4th Cir. 1994) (stating that "estoppel against the government cannot be premised on oral representations"). As the court stated in Rider v. United States Postal Service, 862 F.2d 239, 241 (9th Cir. 1988), "[a] simple misstatement is not affirmative misconduct. The fact that it is given orally makes it even less likely to rise to the level of affirmative misconduct." In Heckler v. Community Health Serv. Inc., 467 U.S. 51, 65 (1984), the Supreme Court reasoned:

> It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect upon the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism and reexamination.

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[5] The four traditional elements of estoppel are: (1) that the government was aware of the facts; (2) that it intended the act or omission to be acted upon; (3) that the party asserting estoppel did not have knowledge of the facts; and (4) that the party asserting estoppel reasonably relied on conduct of the government to his substantial injury. Linkous, 142 F.3d at 277.

Therefore, even assuming the RAD analyst mistakenly advised the Committee, the analyst's conduct does not rise to the level of affirmative misconduct. No evidence exists that the analyst intentionally misled the Committee. In addition, the purported advice was given orally, thereby making it "even less likely to rise to the level of affirmative misconduct." Rider, 862 F.2d at 241. Moreover, rejecting estoppel will not cause a serious injustice to the Committee which was not entitled to include excessive nonfederal points in 1996. Indeed, applying estoppel would be unjust to all the committees who correctly calculated their ballot composition ratios and properly allocated funds.

D. 11 C.F.R. § 106.5(d) is Not Unconstitutional

The Committee claims that the ballot composition set forth in 11 C.F.R. § 106.5(d) is so convoluted that the regulation is constitutionally infirm. However, contrary to the Committee's claims, the regulation is neither "void for vagueness" nor violative of substantive due process.

The void for vagueness doctrine requires that regulations be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit, and do so in a manner that does not encourage arbitrary and discriminatory enforcement. Stephenson v. Davenport Community Sch. Dist., 110 F.3d 1303, 1308 (8th Cir. 1997). In order to satisfy constitutional due process standards, however, regulations need not achieve "mathematical certainty," Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). "[R]egulations will be found to satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to

achieve, would have fair warning of what the regulations require." Freeman United Coal Mine Co. v. Federal Mine Safety and Health Review Comm'n., 108 F.3d 358, 362 (D.C. Cir. 1997).[6]

The regulation at issue gave the Committee "fair warning" of the conduct required. By 1996, the Committee knew that the regulation addressed regularly scheduled statewide elections of State Representatives and State Senators, and that it permitted one nonfederal point per office in those situations. Moreover, by claiming it sought advice from a RAD analyst concerning the treatment to accord to the special election in one legislative district to fill the vacancy created by the death of an incumbent, the Committee impliedly admits it knew that its point allocation posed a risk of violation. See Maynard v. Carwright, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on lack of notice, and hence may be overcome in any specific case where reasonable persons would know their conduct was at risk.").

Moreover, by 1996, AO 1991-6 and the E&Js published in the Federal Register, as discussed in the General Counsel's Brief at pp. 8-10, established that the Commission would interpret ballot composition issues in accordance with the "average ballot" approach. "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." General Electric Co. v. United States Envtl. Protection Agency, 53 F.3d 1324, 1329 (D.C. Cir. 1995). Cf. Perales v. Reno, 48 F.3d 1305, 1316 (2d Cir. 1995) ("Due

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[6] The Committee does not assert that § 106.5(d) limited any expression protected by the First Amendment. Therefore, the provision is not subject to a more stringent "specificity" test. See Village of Hoffman Estates v. The Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982).

process cases have long recognized that publication in the Federal Register constitutes an adequate means of informing the public of agency action."). The Committee's Democratic counterpart understood the applicable standards. See MUR 4674 (New Jersey Democratic State Committee correctly determined its ballot composition ratios for administrative and generic voter expenses in 1995 and 1996), and the General Counsel's Brief at pp. 7-8 and 11.

The Committee inaccurately asserts that the regulation's purported "lack of clarity creates confusion even for the Commission whose Advisory opinions differ in interpretation," and that "[t]he Commission's General Counsel's brief at page 8 contemplates the use of an 'average ballot' approach which is not discussed in . . . the explanatory opinions." Committee's Brief at p. 7. As previously discussed in the General Counsel's Brief at pp. 8-10, the advisory opinions referenced by the Committee are consistent with each other, and consistent with the Commission's reason to believe finding in this matter. Moreover, as previously noted, AO-1991-6 does discuss the "average ballot" concept and references the E&J published in the Federal Register, which includes further explanation of this approach. See AO 1991-6 at p. 5 and 55 Fed. Reg. at 26064. See also 57 Fed. Reg. 8990, 8991 (March 13, 1992) (additional discussion of the "average ballot" concept).

Likewise unavailing is the Committee's claim that the regulation is void for vagueness on arbitrary and discriminatory application grounds because "[i]it cannot be universally applied in each of the fifty states because some states, like New Jersey, hold federal and non-federal elections in different years." Committee's Brief at p. 6. This argument essentially says that every regulation which includes exceptions, or makes distinctions between dissimilarly situated parties, is void for vagueness. That the regulation applies some different treatment to states that do not hold federal and nonfederal elections in the same year is set forth clearly in the regulation.

The separate headings for 11 C.F.R. §§ 106.5(d)(1) and (d)(2) delineate that a general rule exists as well as an exception for states not holding federal and nonfederal elections in the same year. Moreover, in the E&J accompanying § 106.5(d), the Commission provides a substantial rationale for the differing regulatory treatment of states that do not hold federal and nonfederal elections in the same year. See 55 Fed Reg. at pp. 26064-65.[7]

Finally, the Committee's vagueness attack on 11 C.F.R. § 106.5(d) fails because the Act provides a procedure for obtaining an advisory opinion from the Commission, 2 U.S.C. § 437f, that enables committees to "remove any doubt there may be as to the meaning of the law," United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973). While it was the Committee's option whether to pursue this route, from a constitutional standpoint, "[t]here is a strong presumption that regulations are not unconstitutionally vague if the regulated party has the means of obtaining clarification either by making inquiry or through an administrative process." City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996), cert. denied, 118 S. Ct. 410 (1997). See also Martin Tractor v. FEC, 627 F.2d 375, 384-85 (D.C. Cir.), cert. denied, 449 U.S. 954 (1980).

The Committee's Brief also suggests a claim that 11 C.F.R. § 106.5(d) violates the Committee's substantive due process rights. Committee's Brief at p. 7. The Committee provides no analysis or support for such a claim. However, "the guaranty of due process. . .

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[7] The E&J explains that the method described in paragraph 106.5(d)(1) would have permitted those states to allocate 100% of their administrative and generic voter drive expenses to their nonfederal accounts in years in which only nonfederal elections were held in the states, and such an allocation would not account for the impact on federal elections upcoming in the following year. The variation of the ballot composition method set forth in paragraph 106.5(d)(2) was intended to ensure that committees in such states allocated a portion of their administrative expenses to their federal accounts even in solely nonfederal election years.

demands only that laws should not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York, 291 U.S. 502, 525 (1934).[8] Under this standard, the challenged regulation has a rational basis. In the E&J for revised § 106, the Commission states that the regulation is intended to implement the contribution and expenditure limitations of 2 U.S.C. §§ 441a and 441b of the Act, "by providing for allocation of expenses for activities that jointly benefit both federal and non-federal candidates and elections. . . .The revisions provide guidance to committees on how to allocate such costs by creating a comprehensive set of allocation rules. . . ." 55 Fed. Reg. at p. 26058. See also AO 1991-15 ("The purpose of the allocation regulations is to ensure that money that does not meet FECA restrictions is not used to influence Federal elections"). Accordingly, 11 C.F.R. § 106.5(d) does not violate the Committee's substantive due process rights.

E. In Addition to a Refund, a Probable Cause to Believe Finding is Appropriate

The Committee cites to AOs 1991-15 and 1983-22 for the proposition that where a miscalculation was made in good faith, the Commission has allowed a transfer of balances between accounts within 30 days to reflect the proper ratio. See Committee's Brief at p. 9. Apparently, the Committee contends, at most, that it should be required to transfer from the federal to the nonfederal account the amount it overpaid, and that no probable cause finding should be made. While this Office agrees that the transfer is warranted, the Committee is not eligible for the treatment it seeks. In the cited cases, advisory opinions were sought close in time

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[8] The Committee does not claim that § 106.5(d) violates a fundamental right. Therefore, if a rational basis exists for the regulation, then it should be found valid. See Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

to problems arising pursuant to new regulatory schemes. In addition, in AO 1991-15, the miscalculation "resulted in an underpayment to a Federal from a nonfederal account." See also AOs 1992-2, 1992-27, and 1993-3 (The Commission permitted retroactive transfers, recognizing that "the allocation regulations represent significant revisions to past practice and require a brief period of readjustment, i.e., the current [1991-1992] election cycle, by political committees acting in good faith.") and AO 1998-21 (stating that by the 1997-98 election cycle, "whatever flexibility may have been appropriate during the adjustment period is no longer appropriate").[9] Here, the Committee requested no advisory opinion and thus declined to use a procedure specifically designed to avoid a sanction; the miscalculations took place several years following the issuance of the regulation; and resulted in a significant overpayment to the federal account with impermissible funds. Moreover, as shown above, the Committee's "good faith" entitlement claims to the additional nonfederal points in 1996 are weak, and it has not challenged the other bases for the Commission's reason to believe finding. See footnote 1, supra. Therefore, a probable cause finding is appropriate.[10]

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

This Office recommends that the Commission approve the attached proposed conciliation agreement.

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[9] In AO 1993-3, the last allocation opinion pertaining to the 1991-1992 cycle, the Commission "note[d] that th[e] request was submitted on December 31, 1992, the last day of the 1991-1992 election cycle and that the 'brief period of adjustment' referenced in Advisory Opinion 1992-2 has now ended."

[10] This Office notes that the quoted language on page 8 of the Committee's Brief, which it attributes to the Commission in AO 1997-21, is in fact an excerpt from a letter from committee counsel asking for reconsideration of the advisory opinion. The Commission did not use this language in its original or revised AO 1997-21.

IV. RECOMMENDATIONS

1. Find probable cause to believe that the New Jersey Republican State Committee and H. George Buckwald, as treasurer, violated 2 U.S.C. §§ 441a and 441b and 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i).

2. Approve the attached conciliation agreement.

3. Approve the appropriate letter.

1/19/99
Date

Lawrence M. Noble
General Counsel

Attachment: Proposed Conciliation Agreement

Staff assigned: Susan L. Lebeaux