

FEDERAL ELECTION COMMISSION
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Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4728
DATE COMPLAINT FILED: 3/16/1998
DATE OF NOTIFICATION: 3/18/1998
DATE ACTIVATED: 9/15/1998

STAFF MEMBER: Seth H. Row

COMPLAINANT: Kevin Artl, Campaign Manager, Judy Biggert for Congress Committee

RESPONDENT(S): Roskam for Congress Committee, and Carl F. Lofgren as treasurer
Peter Roskam
Campaign for Working Families, and Francis P. Cannon, as treasurer
Gary L. Bauer, Chairman, Campaign for Working Families

RELEVANT STATUTE(S): 2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 431(17)
2 U.S.C. § 434(a)(6)(A)
2 U.S.C. § 434(a)(6)(B)
2 U.S.C. § 434(b)(6)(B)
2 U.S.C. § 434(c)(2)
2 U.S.C. § 441a(a)(7)
2 U.S.C. § 441a(a)(2)(A)
2 U.S.C. § 441a(f)
2 U.S.C. § 441d(a)
11 C.F.R. § 100.8(a)(2)
11 C.F.R. § 100.7(a)(1)(iii)
11 C.F.R. § 100.8(a)(1)(iv)
11 C.F.R. § 100.22(a)
11 C.F.R. § 104.3(b)(3)(vii)
11 C.F.R. § 104.4(b)
11 C.F.R. § 104.5(f)
11 C.F.R. § 104.5(g)
11 C.F.R. § 109.1(a)
11 C.F.R. § 109.1(b)(3)
11 C.F.R. § 110.11(a)(1)

INTERNAL REPORTS CHECKED: FEC Indices
 Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Kevin Artl, ("Complainant"), the campaign manager for Judy Biggert for Congress. Ms. Biggert defeated Mr. Roskam in the Republican primary on March 17, 1998 for the House of Representatives from the 13th District of Illinois. The complaint alleges that Campaign for Working Families ("CWF") and Gary L. Bauer, CWF's Chairman, failed to report expenditures made in support of Mr. Roskam and Roskam for Congress Committee ("the Committee") within 24 hours of the expenditures being made, and alleges in the alternative that these expenditures were contributions to Mr. Roskam's campaign in excess of statutory limits.

II. FACTUAL AND LEGAL ANALYSIS

A. Complaint and Responses

The complaint alleges that CWF and Mr. Bauer failed to report the cost of two mailings, produced by CWF in support of Mr. Roskam's campaign for the Republican nomination, as an independent expenditure within 24 hours, in violation of 2 U.S.C. § 434(c)(2) and 11 C.F.R. § 104.4(c)(1). Complainant alleges, alternatively, that these expenditures were last-minute in-kind contributions to the Committee, because both mailings expressly advocated the defeat of Judy Biggert and the election of Roskam and failed to mention any of the other candidates in the Republican primary. Complainant alleges that if the mailings were contributions, because these contributions were made within 20 days of the election, and the Committee did not report them

within 48 hours, the Committee violated 11 C.F.R. § 104.5(f). Complainant also alleges that the cost of the two mailings exceeded the limit of \$5,000 on CWF's permissible contributions to the Committee, in violation of 2 U.S.C. § 441a(a)(2), and that the Committee violated 2 U.S.C. § 441a(f) by accepting these contributions.

Peter Roskam submitted a response for himself and his campaign committee, in which he denies receiving any in-kind contributions from CWF.

Respondents Campaign for Working Families and Gary L. Bauer, Chairman of CWF, submitted a detailed response to Complainant's allegations. CWF and Mr. Bauer argue that Mr. Bauer is not a proper respondent, deny that they coordinated their expenditure with Mr. Roskam or his committee, but admit to creating and sending the two mailings and failing to file on time. They argue, however, that no further action should be taken against them.

First, CWF and Mr. Bauer assert that Mr. Bauer is not a proper respondent in this matter, because, although Mr. Bauer signed both the letter and the pamphlet mailed to voters in the district, he is not responsible for maintaining CWF's records or filings with the Commission; nor did he make any of the expenditures out of his own pocket.

Second, CWF and Mr. Bauer point out that Complainant does not allege or provide any information pointing to coordination between CWF or Mr. Bauer and the Committee. CWF and Mr. Bauer argue that the failure of the mailings to mention any candidates in the primary other than Roskam and Biggert does not lead to an inference that there was coordination with any candidate. They point out that Roskam and Biggert were the two front-runners in the primary, and that they hold different positions on abortion, a key issue to CWF. CWF and Mr. Bauer include an affidavit from CWF's executive director, Peter Dickinson, denying that any coordination took place in regard to the mailings.

Finally, CWF and Mr. Bauer admit that CWF inadvertently failed to file a report of the independent expenditures within the 24-hour period, as required. The first mailing, the letter, was sent out on March 2, 1998 and the second, the pamphlet, was sent out approximately one week later, according to these respondents. Respondents did not file a report reflecting these expenditures until March 16, 1998. However, they argue that because of what they describe as mitigating factors, no further action should be taken against them.

CWF and Mr. Bauer assert that because the public was aware of the independent expenditures "well before" the election, no further action should be taken. In support of this position they note that Ms. Biggert's campaign held a news conference on Friday, March 14, 1998, to announce that CWF had failed to report the cost of the mailings and that Mr. Arlt was filing this complaint with the Commission. On the same day a newspaper article appeared announcing the Biggert campaign's allegations. On Monday, March 16, 1998, one day before the primary, CWF reported to the Commission that it had made an independent expenditure of \$50,900 in connection with the mailings at issue. CWF and Mr. Bauer also argue that because they have made substantial efforts to comply in general with the reporting requirements of the Act, because the violation had no apparent effect on the primary, and because no other allegations have been made against CWF for reporting violations, no further action is warranted.

B. Law

1. Independent Expenditures

The Federal Election Campaign Act of 1971, as amended ("the Act"), defines an independent expenditure as an expenditure for a communication, such as a direct mail advertisement, that expressly advocates the election or defeat of a clearly identified candidate and is not made in coordination, consultation with or at the direction of a candidate, a candidate's

agent, or a candidate's committee. 2 U.S.C. § 431(17), 11 C.F.R. § 109.1(a). A candidate is "clearly identified" if, among other things, the candidate's name appears in the communication. 11 C.F.R. § 109.1(b)(3). A communication "expressly advocates" for a candidate if the communication calls for the election or defeat of the candidate using certain terms. 11 C.F.R. § 100.22(a). Phrases such as "Vote for" preceding the candidate's name create express advocacy for the candidate in the communication.¹ Id.

a. Reporting requirements for last-minute independent expenditures

Independent expenditures by a political committee over \$1,000, made within twenty days of an election but more than 24 hours before the election, must be reported to the Commission within 24 hours of the expenditure being made. 2 U.S.C. § 434(c)(2); 11 C.F.R. § 104.4(b); 11 C.F.R. § 104.5(g). The 24 hour requirement is triggered when a contract with a vendor to make expenditures is made, not when the services or materials are received or when the services or materials are paid for. 11 C.F.R. § 100.8(a)(2) ("A written contract, including a media contract... to make an expenditure is an expenditure as of the date such contract, promise, or obligation is made."). The 24 hour report must contain, among other things, a statement which indicates whether the expenditure was made in support of or in opposition to a candidate, and a notarized certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation or concert with, or at the request or suggestion of any candidate or their authorized committee or agent. 11 C.F.R. § 104.3(b)(3)(vii).

¹ The Commission's definition of express advocacy also includes a standard which is contained in 11 C.F.R. § 100.22(b). This portion of the regulations, which has been held unconstitutional by the First Circuit, Maine Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996), cert. denied, 118 S. Ct. 52 (1997), and implicitly rejected by the Fourth Circuit, FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997), is not at issue in this case.

In addition to reporting last-minute expenditures within 24 hours, a political committee must report such independent expenditures again, on a Schedule E form filed with its next scheduled report. 11 C.F.R. § 104.4(a).

b. Disclaimers

Every public political advertisement containing express advocacy purchased by a nonconnected political committee must contain a disclaimer notice identifying who paid for the advertisement. 2 U.S.C. § 441d(a), 11 C.F.R. § 110.11(a)(1). In the case of advertisements not authorized by a candidate or a candidate's committee, the disclaimer must identify the committee that paid for the advertisement and state that it was not authorized by the candidate or the candidate's committee. 2 U.S.C. § 441d(a)(3).

c. Contributions in the Form of Expenditures

According to the Act, coordinated expenditures - i.e. those made after consultation or coordination with candidates - are deemed to be contributions, rather than independent expenditures. 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered a contribution to such candidate."). In regulations, the Commission has explained that the Act's definition of what will be considered a contribution includes any expenditure made with "[a]ny arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display or broadcast of the communication."² 11 C.F.R. § 109.1(b)(4).

² The Commission is currently engaged in rulemaking which may change the definitions of some of the terms used in the Commission's definition of "coordination," the degree to which the basing of an expenditure on information about the candidate's plans, projects or needs

a. Disclosure of last-minute contributions

The Act requires the principal campaign committee of a candidate for the House to notify the Commission in writing of any contribution of \$1,000 or more received by any authorized committee of such candidate after the twentieth day, but more than 48 hours before, any election. 2 U.S.C. § 434(a)(6)(A); 11 C.F.R. § 104.5(f). Notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate, the office sought by the candidate, the identification of the contributor, the date of the receipt, and amount of the contribution. Id. This required notification is in addition to all other reporting requirements under the Act. 2 U.S.C. § 434(a)(6)(B).

b. Limits on contributions

The Act limits to \$5,000 the amount that a qualified multicandidate committee may contribute to a candidate or their authorized committee.³ 2 U.S.C. § 441a(a)(2)(A).

The Act further provides that a candidate may not knowingly accept, and a political committee may not knowingly make, an excessive contribution in violation of the provisions of the Act. 2 U.S.C. § 441a(f).

C. Analysis

1. Mailings Do Not Appear to Be In-Kind Contributions to the Committee

Implicit in Complainant's argument that the expenditures may have constituted in-kind contributions to the Committee is an assertion that CWF's mailings may have been coordinated

compromises the independence of the expenditure, and who is considered a candidate's "agent." See 62 Fed. Reg. 24367, 24372 -73 (May 5, 1997).

³ A multicandidate committee is a committee which has been registered with the Commission for at least six months, has received contributions from more than 50 persons, and has made contributions to five or more candidates for federal office. 2 U.S.C. § 441a(a)(4). CWF is a qualified multicandidate committee.

with Mr. Roskam or his authorized campaign committee. Complainant presents no evidence of any such coordination. Instead, Complainant attempts to infer coordination with the Roskam Committee from the fact that the mailings advocated the election of Roskam and the defeat of Biggert and did not mention any of the other candidates in the Republican primary. Roskam for Congress and CWF both deny that any coordination took place.

This Office does not agree that the contents of the mailings alone provides a sufficient basis for a conclusion that there is reason to believe that the mailings were coordinated. Based on the absence of any evidence that coordination took place between CWF and the Committee, and on Respondents' denials that there was any coordination, this Office recommends that the Commission find no reason to believe that Roskam for Congress Committee and Carl F. Lofgren, as treasurer, violated 2 U.S.C. § 434(a)(6)(A) or 2 U.S.C. § 441a(f), and recommends that the Commission close the file as to the Committee. This Office also recommends that the Commission find no reason to believe that Campaign for Working Families and Francis P. Cannon, as treasurer, made excessive contributions to the Roskam Committee in violation of 2 U.S.C. § 441a(a)(2)(A).

2. Mailings Appear to be Independent Expenditures That Were Not Timely Reported

Complainant alleges that if the mailings were independent expenditures by CWF, they were not reported to the Commission within 24 hours of being made, as required by 2 U.S.C. § 434(c)(2). Respondents admit that they failed to report the expenditures for the two mailings within the prescribed period but argue that their reporting the expenditures before the election, the fact that Ms. Biggert's campaign publicized CWF's expenditures before the election, and

CWF's efforts to comply with the Act in general provide sufficient mitigation to justify no enforcement action being taken against them.

As an initial matter, to fall within the purview of the independent expenditure regulations the mailings must have expressly advocated the election or defeat of a clearly identified candidate. 2 U.S.C. § 431(17); 11 C.F.R. § 109.1(a). Mr. Roskam's name is featured prominently in both the letter and the pamphlet. See 11 C.F.R. § 109.1(b)(3). Both mailings also call for Mr. Roskam's election as the Republican candidate for the House seat, using phrases such as "I urge you to vote for Peter Roskam" and "On March 17, there is one choice for Republicans: Peter Roskam for Congress." Both mailings thus fall squarely within the Commission's definition of express advocacy of a clearly identified candidate, and thus appear to have qualified as independent expenditures. See 11 C.F.R. §§ 109.1(b)(2) and 100.22. Indeed, this point is undisputed by Respondents.

Respondent Campaign for Working Families further admits that it did not report the cost of the two mailings, \$50,900 paid to its vendor on March 2, 1998, within the 24 hour period prescribed by the Act and Commission regulations. See 2 U.S.C. § 434(c)(2), 11 C.F.R. §§ 104.4(b) and 104.5(g). CWF did not report the expenditures until March 16, 1998, two weeks later, when it filed a Schedule E 24-Hour Notice of the mailing expenditures.⁴

In addition, CWF's March 16, 1998 filing reveals that it spent an additional \$18,210 for radio advertisements in support of Mr. Roskam on two local radio stations. CWF's March 16,

⁴ This report may have been more than two weeks late, however, because the triggering date for the 24-hour notice requirement may have been earlier than March 2, the date that the disbursement was made, if the contract between CWF and its vendor to produce and distribute the mailings was signed earlier than that date. See 11 C.F.R. § 100.8(a)(2) ("A written contract, including a media contract... to make an expenditure is an expenditure as of the date such contract, promise, or obligation is made.").

1998 filing reports the expenditure date for these radio advertising buys as Thursday, March 13, 1998, meaning that CWF also did not report these radio expenditures within 24 hours. In total, it appears that CWF failed to report \$69,510 spent in the last weeks of the primary race within 24 hours, in violation of 2 U.S.C. § 434(c)(2).

As previously noted, however, CWF argues that there are what they describe as mitigating factors which obviate the need for further enforcement efforts. First, CWF asserts that it reported the expenditures as soon as it became aware of its oversight. However, CWF's filing came only one day before the primary election; Commission records show that the filing did not go on the public record until March 18, 1998, one day after the election. Since the purpose of the 24-hour notification requirement is to notify the public of large independent expenditures in advance of the election, this Office does not believe that CWF's disclosure in a report which was not part of the public record until after the election is a mitigating factor.

Second, CWF asserts that because Ms. Biggert's campaign publicized CWF's expenditures before the primary, CWF's failure to file on time had less impact on the public disclosure goals of the 24-hour reporting requirement than it might have. The Commission has concluded that press accounts of contributions cannot replace compliance with reporting requirements because they are not subject to the same verification requirements as disclosures to the Commission, and are thus not necessarily accurate as to the amount of the expenditure, and do not disclose the same information as a report to the Commission. See, e.g., MUR 3721 (concluding that widespread press accounts of Ross Perot's contributions to his own 1996 presidential campaign did not mitigate his campaign committee's violations of 48-hour contribution reporting regulations.)

Finally, CWF argues that it has made substantial efforts to comply with Commission reporting and accounting requirements in general. However, even if this were a mitigating factor, as noted below CWF has failed to properly disclose independent expenditures made in connection with several different candidates in the 1998 cycle on more than this one occasion. CWF also argues that it has corrected its mistake in good faith, and that its failure to report in a timely manner had no discernible effect on the outcome of the election. This Office recommends that the Commission decline to accept this as a basis for reducing the going-out-the-door penalty.

Because CWF failed to report independent expenditures totaling \$69,510 to the Commission within 24 hours of their being made this Office recommends that the Commission find reason to believe that Campaign for Working Families and Francis P. Cannon, as treasurer, violated 2 U.S.C. § 434(c)(2).

3. Mailings Contained an Inadequate Disclaimer

Additionally, it does not appear that either of the mailings complied with the disclaimer requirements for independent expenditures. Both mailings state that they are "Paid for by the Campaign for Working Families," in compliance with 11 C.F.R. § 110.11(a)(1). In the case of advertisements not authorized by a candidate or a candidate's committee, however, the disclaimer must not only identify the committee that paid for the advertisement but also state that it was not authorized by the candidate or the candidate's committee. 11 C.F.R. § 110.11(a)(1)(iii). Both mailings state, on the same line as the "Paid for..." language, "Not affiliated with any candidate or candidate's committee." The words "not affiliated with" in this context are not an adequate substitute for a clear statement that the advertisement is not "authorized by" the candidate or his committee. The words "not affiliated with" positioned immediately after the "paid for by" language may have conveyed to some readers that CWF is

not "affiliated with any candidate or candidate's committee," and not the meaning which such disclaimers are intended to convey, namely, that the mailing is not authorized by any candidate or his committee.

Because the disclaimers on both mailings were not sufficiently clear to communicate that the mailings were not authorized by Mr. Roskam or his candidate committee, this Office recommends that the Commission find reason to believe that Campaign for Working Families and Francis P. Cannon, as treasurer, violated 2 U.S.C. § 441d.

4. CWF Failed to Fully Report March and May Independent Expenditures On Its Monthly Reports

During its investigation of Complainant's allegations, this office discovered that CWF did not make a complete disclosure of independent expenditures on two other occasions as well.

CWF filed a 24-Hour Report of the independent expenditures on behalf of Mr. Roskam, totaling \$69,510, on March 16, 1998. However, in discussions with the Reports Analysis Division ("RAD") concerning respondent's claim that they have complied with all other reporting requirements, RAD informed this office that CWF only reported \$10,625.70 of these independent expenditures on behalf of Mr. Roskam in its April monthly report which covered the period March 1, 1998 to March 31, 1998.⁵ CWF thus failed to report \$58,884.30 in its April monthly report.

Discussions with RAD revealed that CWF also failed to disclose on its June monthly report independent expenditures made on behalf of Perry Atkinson, a candidate in a primary

⁵ CWF noted on the monthly report that the vendor it indicated as being paid the \$10,625.70, "Creative Printing Service," of Des Plaines, Illinois, "... is part of the reported spending of (sic) Schedule 'E' on March 16, 1998 for Association Mailing Services." This cryptic notation does not shed light on why CWF failed to disclose the total amount of \$69,510 in independent expenditures on Mr. Roskam's behalf.

election for the House of Representatives in Oregon held on May 19, 1998. CWF reported \$18,500 of independent expenditures on behalf of Mr. Atkinson, made on May 6, 1998, within 24 hours of their being made, but only reported \$12,083 of these expenditures in its June filing, covering May 1, 1998 to May 31, 1998. CWF thus failed to report \$6,417.00 on its June monthly report. CWF was required, on both occasions, to report the whole of its independent expenditures, as disclosed on its 24-Hour reports, on its next monthly reports. 2 U.S.C. § 434(b).

RAD was in the process of drafting Requests for Additional Information to be sent to CWF on these two issues when this Office became aware of these potential violations. Discussions with RAD disclosed that the failure to fully disclose the independent expenditures on behalf of Mr. Roskam was immediately referable, but that the failure to fully disclose the expenditures on behalf of Mr. Atkinson was not referable. However, because the issue of CWF's compliance with the reporting requirements of the Act was raised by CWF in its response, this Office recommends that these two incomplete disclosures be included with this matter. If the Commission agrees to this process, RAD will not refer the incomplete April and June monthly reports.

Because CWF failed to report a total amount of \$65,301.31 on its April and June monthly reports, this Office recommends that the Commission find reason to believe that Campaign for Working Families and Francis P. Cannon, as treasurer, violated 2 U.S.C. § 434(b).

5. Gary L. Bauer Should Not Be a Respondent in this Matter

Complainant has presented no evidence that Mr. Bauer was involved personally in any of the activity alleged in the complaint. In addition, it is not the Commission's usual practice to make findings against the Chairman of a political committee for a reporting violation. Therefore,

this Office recommends that the Commission find no reason to believe that Gary L. Bauer, Chairman of CWF, violated any portion of the Act, and close the file as to Mr. Bauer.

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

In addition to the reason to believe recommendations, this Office recommends that the Commission offer to enter into conciliation with the remaining respondents prior to a finding of probable cause to believe on the disclaimer, 24 hour reporting, and monthly reporting violations cited above. Attached for the Commission's approval is a proposed conciliation agreement

IV. RECOMMENDATIONS


1. Find no reason to believe that Gary L. Bauer, Chairman of Campaign for Working Families, violated the Act, and close the file as to Mr. Bauer.
2. Find reason to believe that Campaign for Working Families and Francis P. Cannon, as treasurer, violated 2 U.S.C. §§ 441d, 434(c)(2), and 434(b) and enter into conciliation prior to a finding of probable cause to believe.
3. Find no reason to believe that Campaign for Working Families and Francis P. Cannon as treasurer violated 2 U.S.C. § 441a(a)(2)(A).
4. Find no reason to believe that Peter Roskam or the Roskam for Congress Committee and Carl F. Lofgren as treasurer violated 2 U.S.C. §§ 434(a)(6)(A) and 441a(f) and close the file as to Peter Roskam and the Roskam for Congress Committee.
5. Approve the attached Factual and Legal Analyses.
6. Approve the attached Conciliation Agreement.
7. Approve the appropriate letters.

Lawrence M. Noble
General Counsel

Date

11/24/98

BY:


Lois G. Lerner
Associate General Counsel

Attachments:

1. Factual and Legal Analyses
2. Proposed Conciliation Agreement



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/VENESHE FEREBEE-VINES
COMMISSION SECRETARY

DATE: DECEMBER 1, 1998

SUBJECT: MUR 4728 - First General Counsel's Report
dated November 24, 1998.

The above-captioned document was circulated to the Commission
on Wednesday, November 25, 1998.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	<u>XXX</u>
Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	—

This matter will be placed on the meeting agenda for
Tuesday, December 8, 1998.

Please notify us who will represent your Division before the Commission on this
matter.