BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4762
American Federation of State, County & Municipal Employees-PEOPLE and William Lucy, as treasurer	)	
American Federation of State, County & Municipal Employees	)	

SENSITIVE

GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

Enter into preprobable cause conciliation with Respondents and approve the attached conciliation agreement.

II. BACKGROUND

On June 23, 1998, the Commission found reason to believe the American Federation of State, County & Municipal Employees ("AFSCME") and its separate segregated fund ("SSF"), the American Federation of State, County & Municipal Employees-PEOPLE and William Lucy, as treasurer ("AFSCME-PEOPLE"), violated 2 U.S.C. § 441b(a) by respectively making and receiving in-kind contributions totaling $15,995. The contributions were in the form of telephone bank activities in support of three federal candidates in 1996, the costs of which were later reimbursed by AFSCME-PEOPLE.[1] The Factual & Legal Analyses concluded that, since AFSCME did not receive payment from AFSCME-PEOPLE prior to the operation of the phone banks, these activities constituted a prohibited disbursement of the union's general treasury monies in connection with a federal election. The Commission also found reason to believe that

[1] *See* General Counsel's Report dated Feb. 28, 2000, for a breakdown of the candidate committees, the dates of the contributions and the amounts reported by AFSCME-PEOPLE as in-kind contributions.

AFSCME-PEOPLE violated 2 U.S.C. § 434(b) by reporting the contributions in an untimely manner, and 2 U.S.C. § 441a(a)(2)(A) by making a $2,500 excessive contribution to a federal candidate in 1996 in the form of an untimely redesignation.[2]

This Office, in the General Counsel's Report ("GCR") in this matter dated February 28, 2000, recommended that the Commission enter into preprobable cause conciliation with Respondents and approve a proposed joint conciliation agreement.

[2] The Commission further found reason to believe that AFSCME-PEOPLE violated 2 U.S.C. § 441a(a)(2)(C) by making $25,000 in excessive contributions to the Texas Democratic Party and four affiliated Texas Democratic county party committees in 1996, but took no further action with regard to that violation on March 14, 2000. *See* GCR dated February 28, 2000.

II. DISCUSSION

The Federal Election Campaign Act imposes a broad ban on contributions and expenditures by corporations and labor organizations "in connection with" any federal election. 2 U.S.C. § 441b(a). The Act broadly defines "contribution or expenditure" to include not only direct and indirect payments and advances, but also any gift of services, "or anything of value." 2 U.S.C. § 441b(b)(2). The "prohibitory language" of this provision was intended to be "plainly all encompassing," thus making this prohibition "the most far-reaching in the entire election law." 117 Cong. Rec. 43,380 (1971) (Remarks of Rep. Hansen), *1971 Leg. Hist.* at 758.

In defining the scope of this ban, the Commission's regulations limit how a corporation or labor organization may use its funds, facilities and personnel to raise contributions for a federal candidate or to expressly advocate the election or defeat of a candidate to persons who are not members of the restricted class. *See generally* 11 C.F.R. § 114. For a labor organization such as AFSCME, the restricted class consists of its members and executive or administrative personnel, and their families. 11 C.F.R. § 114.1(j). Although a labor organization may make registration and get-out-the-vote communications to the general public, such communications may not expressly advocate the election or defeat of any clearly identified candidates. 11 C.F.R. § 114.4(c)(2). Such public communications may only be made by a labor organization's SSF, using voluntary contributions. 11 C.F.R. § 114.5(i). Because the communications at issue

expressly advocated the election of federal candidates and were not limited to AFSCME's restricted class, they could not be paid for with the union's general treasury monies.[6]

With respect to the issue of whether a distinction should be made between employees and facilities for purposes of requiring advance payment, this Office believes that no such distinction should be made in the circumstances of this case; that is, where the labor organization undertakes the election activity, using its own paid employees on its own premises, and the use of corporate resources and facilities (here, the labor organization's telephone banks and miscellaneous overhead) is incident to the activities. At the Executive Session of March 14, 2000, attention was focused on 11 C.F.R. § 114.9(d), which permits reimbursement for the use or rental of corporate or labor organization facilities within a commercially reasonable time in the amount of the normal and usual rental charge, including telephones, when used by "[p]ersons, other than those specifically mentioned in" in subsections 114.9(a) (corporations) and 114.9(b) (labor organizations). With regard to labor organizations, subsection 114.9(b) covers "officials, members, and employees" of such organizations. This Office believes that subsection 114.9(d) does not apply to the incident use of labor organization facilities in connection with a federal election by the organization's own employees who are being paid by their employer to render their services to a federal candidate.

The Commission reached this precise conclusion in Advisory Opinion ("AO") 1984-24, at a time when 11 C.F.R. § 114.9(d) existed in exactly the same form as it does today. In that AO, the Commission considered whether the Sierra Club Committee on Political Education

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[6] While the Act does permit general treasury monies to be used for the "establishment, administration, and solicitation of contributions" to an SSF, *see* 2 U.S.C. § 441b(b)(2)(C), this cannot be used "as a means of exchanging treasury monies for voluntary contributions." 11 C.F.R. § 114.5(b).

("SCCOPE"), the SSF of the Sierra Club, a non-profit corporation, could make an in-kind contribution to candidates by purchasing from the Club both the services of its employees *and* the use of corporate facilities incident to these services. SCCOPE proposed either to reimburse the Sierra Club for the Club's costs plus a surcharge, or to make advance payments to an escrow fund from which the Club could reimburse itself for its actual costs. Under either method, the initial disbursement of funds for employee compensation and related use of corporate facilities was to be made by the corporation. The Commission disapproved both payment methods as violating 2 U.S.C. § 441(b) because they involved the initial disbursement of corporate funds and hence a contribution to SCCOPE and to the candidate committees. According to the Commission, section 114.9 "was not intended to apply to permissible corporate disbursements of treasury funds *or to disbursements by a corporation's [SSF]* because such activities are covered in other sections of Part 114" (emphasis added).

Significantly, in submitting its request for the AO, SCCOPE distinguished between compensation and use of facilities by specifically requesting whether it "may purchase the use of [corporate] facilities in connection with the provision of services purchased from [the corporation] and pay [the corporation] the normal and usual charge within 30 days." SCCOPE defined "facilities" as corporate "office space, furniture, equipment and any goods incidental to" such use. The Commission responded that section 114.9 "does not purport to apply to the use of corporate facilities in connection with a Federal election by corporate employees who are being compensated for rendering their services to a Federal candidate."

AO 1984-24 was issued in response to a section 437f request made by the Sierra Club and SCCOPE shortly after the Commission found reason to believe they each violated 2 U.S.C. § 441b(a) in connection with, inter alia, reimbursements by SCCOPE to the Sierra Club for

activities conducted by the Club on behalf of federal candidates. *See* MUR 1586 First GCR, dated March 22, 1984. The reimbursements were for staff salaries *and* the related use of corporate materials and facilities, the same factual situation addressed in the advisory opinion request, and the same scenario present in the instant matter. Two weeks after the Commission issued AO 1984-24, the Sierra Club and SCCOPE filed a complaint in the U.S. District Court for the District of Columbia, challenging the Commission's construction and application of 2 U.S.C. § 441b to the factual situations present in MUR 1586 and in AO 1984-24. The complaint asked the court to set aside AO 1984-24 as contrary to law and to the First Amendment, and to permanently enjoin the Commission from continuing its ongoing investigation in MUR 1586 or initiating any new investigation concerning the legality of such activities.

The district court, in a second ruling,[7] granted the Commission's motion to dismiss, holding that the Commission's interpretation of 2 U.S.C. § 441b(a), as manifested by AO 1984-24, "is reasonable, and is not arbitrary, capricious, or manifestly contrary to the statute." *Sierra Club v. FEC*, 593 F. Supp. 166 (D.D.C.), *rev'd mem.* (D.C. Cir. 1984), *on remand* (D.D.C. 1984) (unpublished opinion) (for full text of opinion see *Fed. Elec. Camp. Fin. Guide* (CCH) [1976-1990 Transfer Binder], ¶ 9222). The court also found that AO 1984-24 did not violate the First Amendment, because the "associational rights and organizational objectives asserted by plaintiffs may be and are overborne by the interests Congress has sought to protect in

[7] The district court initially dismissed the complaint, ruling that the case was not ripe for consideration because plaintiffs (Sierra Club, et al.) had not exhausted the administrative remedies available to them before filing suit. Plaintiffs appealed this ruling to the U.S. Court of Appeals for the District of Columbia Circuit. The appeals court treated plaintiffs' motion to expedite the appeal as a motion for summary reversal. The appeals court granted this motion, reversing the district court's dismissal, and remanded the case to the district court for further consideration.

enacting section 441b." *Id.* (citing *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982)). Subsequent to this decision, the Sierra Club and SCCOPE entered into probable cause conciliation with the Commission in MUR 1586, culminating in a conciliation agreement containing an admission that the "initial disbursements of corporate treasury money [in connection with payments for staff and their use of corporate facilities, as detailed in the facts section of the agreement] constituted corporate contributions and/or expenditures in violation of the Act." Therefore, since 1984, the regulated community has been on notice that when SSFs use their connected organizations' employees to perform services in connection with federal elections, those services and any facilities used incident thereto must be paid in advance.

A similar approach was taken by the Commission in 1995, when it revised and added new regulations to Part 114. In the 1995 regulations (effective March 13, 1996), "facilitation" is defined as "using corporate or labor organization resources or facilities to engage in fundraising activities in connection with any federal election . . . ." 11 C.F.R. § 114.2(f)(1). Akin to the situation in the instant matter, the regulations state that facilitation occurs when officials or employees of the corporation or labor organization order or direct subordinates or support staff to plan, organize or carry out fundraising as part of their work responsibilities, "*using corporate or labor organization resources,* unless the corporation or labor organization receives *advance payment* for the fair market value of such services" (emphasis added). 11 C.F.R. § 114.2(f)(2)(i)(A). Again, this describes the situation of impermissible general treasury funds being expended to pay employees engaged in election-related activity, and in such circumstances the materials or facilities utilized are considered incident to the employee services, and payment for delivery of the services must be made in advance.

The facilitation regulations appear to be compatible in this regard with situations involving other candidate support activities, such as the operation of phone banks. Here, AFSCME directed its staff to engage in public communications in support of federal candidates "using . . . labor organization resources." *Id.* The term "resources" in the facilitation regulations would appear to encompass corporate or union facilities such as phone banks and office space. Accordingly, whether such communications expressly advocated the election of particular candidates *or* solicited contributions on their behalf, such activities, including any related use of facilities, would appear to require advance payment by the SSF to avoid a prohibited contribution.[8] *See* AO 1984-37 (an SSF may purchase consulting services from employees of its connected organization, which the organization proposed to make available to federal candidates, so long as the purchase does not involve the initial disbursement of corporate funds from the connected organization's treasury).[9]

Part 114 of the Commission's regulations, which addresses "Corporate and Labor Organization Activity," was transmitted to Congress along with several other regulations that

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[8] More recently, in MUR 4131 (NARAL) (1996), the Commission made reason-to-believe findings of possible violations of 2 U.S.C. § 441b(a) and approved Factual & Legal Analyses which included, inter alia, an issue of whether an SSF had paid in advance for phone banks operated by its connected organization, a non-profit corporation. *See* MUR 4131 First GCR, dated July 5, 1996. The Factual & Legal Analyses noted that there were questions concerning whether the phone banks were operated by volunteers and who actually provided the telephones and facilities. In its Statement of Reasons explaining why it chose to take no further action and close the file, the Commission emphasized that "all goods and services must be paid for by the SSF in advance." By not making any distinction between the services provided by the callers and the telephones and other facilities used by them, the Commission in MUR 4131 implicitly interpreted the Act and regulations to prohibit reimbursement for both services *and* facilities by an SSF to its connected organization.

[9] AO 1984-37 concerned the purchase of services by the SSF and did not address the use of corporate facilities; the SSF claimed that if it were to use any equipment or facilities in connection with the services, it would obtain them from independent contractors.

implemented the 1976 Amendments to the Act. The Commission's Explanation and Justification ("E&J") for subsection 114.9(d) paraphrases the language of the regulation and includes an example of such use of facilities: "Any person who rents corporate or labor organization equipment or furniture, as for example a corporation might loan a candidate office furniture, is required to pay for the normal or usual rental charge for the equipment or furniture used." Federal Election Regulations, E&J for Part 114, H.R. Doc. No. 44, 95th Cong., 1st Sess. 116 (1977). The E&J does not indicate, either expressly or implicitly, that the section applies to a situation where the corporation or labor organization is using its own employees and resources to conduct election activities. Moreover, the Commission could not have been more emphatic in interpreting the regulation in AO 1984-24 as not applying to such situations.

Based on the above, by not receiving advance payment in the form of voluntary contributions through its SSF for the express advocacy activities of AFSCME's employees and the facilities incident thereto, AFSCME made, and AFSCME-PEOPLE received, prohibited in-kind contributions in violation of 2 U.S.C. § 441b(a). AFSCME-PEOPLE's reimbursement to AFSCME for the costs of the phone bank activities did not cure the violations, since the violations occurred at the time the union provided its services and facilities without first receiving payment from its SSF.

III. PROPOSED CONCILIATION AGREEMENT

This Office recommended in its previous GCR that the Commission approve a proposed joint agreement for AFSCME and AFSCME-PEOPLE

This Office recommends that the Commission enter into conciliation with Respondents and approve the attached proposed conciliation agreement.

IV. RECOMMENDATIONS

1. Enter into conciliation with the American Federation of State, County & Municipal Employees and the American Federation of State, County & Municipal Employees-PEOPLE and William Lucy, as treasurer, prior to a finding of probable cause to believe, and approve the attached proposed conciliation agreement.

2. Approve the appropriate letter.

Lawrence M. Noble
General Counsel

7/17/00
Date

BY: _____
Lois G. Lerner
Associate General Counsel

Attachments
1. Correspondence between Commission and Respondents
2. Proposed Joint Conciliation Agreement

Staff Assigned: Thomas J. Andersen

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: July 18, 2000

SUBJECT: MUR 4762 - General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of ____________

Open Session _________ Closed Session __________

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble
General Counsel

FROM Mary W. Dove/Lisa R. Davis
Acting Commission Secretary

DATE: July 21, 2000

SUBJECT: MUR 4762 - General Counsel's Report
dated July 17, 2000.

The above-captioned document was circulated to the Commission on **Tuesday, July 18, 2000.**

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

Commissioner Mason	_
Commissioner McDonald	_
Commissioner Sandstrom	_
Commissioner Smith	_
Commissioner Thomas	**XXX**
Commissioner Wold	_

This matter will be placed on the meeting agenda for

Tuesday, July 25, 2000.

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