BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Benton for Congress and	)	**MUR 5066**
Don Benton, acting as treasurer	)	

RESPONSE TO GENERAL COUNSEL'S BRIEF

By and through the undersigned counsel, Don Benton for Congress and Don Benton, acting as treasurer ("Respondent"), hereby respond to the General Counsel's Brief in this MUR.

I. INTRODUCTION

Don Benton unsuccessfully ran for Congress, specifically the third district of Washington, in 1998. He was a first-time Federal candidate, and won a four-way Republican primary held on September 15, 1998, before losing the general election on November 3. Since that time, Don Benton has been caught in the morass of a Commission-initiated audit and enforcement proceeding.

For two years, Respondent has had to navigate this start and stop process, a process that has already cost him significant resources and time. To deal with the audit, Respondent had to incur the significant expense of a professional accountant. Respondent has cooperated fully, having submitted written material and having obtained additional documentation in response to the audit. Further, although the campaign is dormant, because of this matter Respondent has been required to continue to file reports with the Commission.

After two years, and after the expenditure of valuable Commission resources, including the deployment of several audit staff to Vancouver, WA, the General Counsel's Brief only takes issue with technicalities:

- First, a little over $13,000 in contributions that the Counsel's Brief asserts were excessive – only due to an alleged failure to maintain written redesignations or reattributions. The contributions were lawful and not excessive – the Counsel's Brief fails to mention that Respondent even went back to each of the contributors for whom a written redesignation or reattribution had been lost or misplaced and secured written declarations from them, confirming their legality.

- Second, a little over two dozen contributions that the Counsel claims required 48-hour notices. But the General Counsel has not established that the contributions were received within the 48-hour notice period, instead relying on the deposit date. Undaunted, and without citation to any legal authority, the Counsel's Brief says "use of the deposit date is a reasonable alternative."

At best, the audit staff may have uncovered less than perfect record-keeping. Such is to be expected from any first-time Federal campaign. But the plight of Respondent was particularly difficult -- due to the late September 15 primary, virtually all of his general election funds were raised in the intervening six weeks. That notwithstanding, Respondent filed 12 separate 48-hour notice reports, for 95 contributions, and raised in excess of $800,000 for the cycle.[1] At issue is a small percentage of that, unearthed during a Commission-initiated full scale field audit.

II. LEGAL ANALYSIS

A. The Contributions at Issue Were Not Excessive

The General Counsel's Brief could not be more one-sided, creating the false impression that Respondent completely failed to obtain reattributions or redesignations for the contributions at issue. Instead, at issue is the General Counsel's misguided hyper-

[1] Respondent's opponent failed to file, and had other compliance issues. A review of the public record reveals that he (1) failed to file his 12 day pre-general report, and (2) failed to respond to a request for additional information (which prompted a second request).

technical interpretation of 11 C.F.R. § 110.1(1)(5) (regarding keeping written reattributions and redesignations).

The purpose of the written reattribution/redesignation requirement is to ensure strict adherence to the contribution limits, and ensure that campaigns do not unilaterally end-run those limits by shifting funds without the contributor's consent. The requirement that campaigns maintain those writings (per section 110.1(1)(5)) provides a bright-line, easily administered rule that avoids what could easily become a factual morass. But the General Counsel's vacuous application of an administratively-friendly rule to this matter yields a result inconsistent with the purpose of the rule, and one not supported by the language of the Act and regulations when read as a whole.

The relevant facts are these: As Respondent had explained in writing to the audit staff, the candidate personally discussed with each and every one of these contributors the legal limits of their contributions. More importantly, Respondent discussed how the contribution was to be allocated and attributed with each of the contributors. As Respondent said to the auditors, the campaign's staff was carefully instructed by the candidate to obtain written redesignation and reallocation letters. Thus, Respondent had in place practices and safeguards to ensure compliance with the Act.

Respondent followed those practices and safeguards. To the best of his knowledge and belief, the candidate and acting treasurer believes his campaign was successful in every case. Only during the preparation for the audit was it discovered that a handful of redesignation or reattribution letters had been lost or misplaced. As a result of this discovery, Respondent contacted each of the donors, and had them sign a written

declaration confirming the contribution was allocated and designated the way they originally instructed.[2]

In sum, the uncontested facts are: (1) the redesignations and reattributions were done orally and in writing, pursuant to the practice of the campaign; (2) a handful of the letters were lost or misplaced; and (3) Respondent obtained additional writings confirming the proper designation or attribution, albeit outside of the sixty days referenced in section 110.1.

Thus, the issue is whether a lost redesignation/reattribution letter can be cured by a subsequent writing by the contributor confirming lawful intent. The actions of Respondent in this matter support an affirmative response. The facts do not give rise to a violation of either the spirit or the letter of the Act. In this case, Respondent has complied with that intent, and the purpose of the rule has not been compromised. The contributions at issue were properly reported, the reports reveal no excessive contribution, and the contributors themselves have confirmed that the allocation or designation as reported indeed reflect the intent and understanding of the contributor.

At best, this case is about the technicalities of record-keeping. It is not a matter of knowingly accepting and retaining excessive contributions. Thus, there is no probable cause to believe that Respondent violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 103.3(b)(3), (4) & (5) by knowingly accepting and retaining excessive contributions.

[2] These signed statements were provided to the auditors, who referenced them in the audit report. Yet, the General Counsel's Brief omits any reference to this evidence. The Counsel's Brief presents no evidence whatsoever that contradicts these facts, choosing instead to ignore it.

B. Whether a Contribution is Subject to the 48 Hour Notice Requirement Is Determined by the Date the Contribution is Received, Not the Date of Deposit.

In recommending probable cause, the General Counsel claims that whether or not a contribution is subject to the 48 Hour notice requirement is determined by the date of deposit, not the date of receipt. But the actual provision of the Act states: "This [48 hour] notification shall be made within 48 hours after the **receipt** of such contribution . . . ." 2 U.S.C. § 434(a)(6)(A) (emphasis added).

Ignoring the standard set forth in the Act, the General Counsel instead has applied a new standard – regardless of when a contribution was received, it is the date of deposit that controls. And the legal authority for this new rule? There is none offered, other than a conclusory statement in the Brief that "use of the deposit date is a reasonable alternative."

The simple uncontested fact is, as Respondent told the auditors, the overwhelming majority of the contributions were received outside of the 48 hour notice period. The truth of this statement is not at issue – the General Counsel all but concedes its accuracy. General Counsel's Brief at 4 ("The remaining 11 checks may have been received prior to the beginning of the reporting period, but not deposited until after the 20th day before the election.").

Instead, the General Counsel resorts to converting a technical recordkeeping mistake (the alleged failure to keep a detailed record of when each contribution was received) into a failure to file. This approach is inconsistent with the actual 48 hour regulation, as that applies only to contributions <u>received</u> within the specified time period. To rule otherwise creates a presumption that all contributions are subject to the 48 hour

notice requirement, unless the campaign can prove otherwise with written documentation. Nowhere is this rule found in the Act or the regulations. On the contrary, the regulations provide that a campaign has 10 days within which to deposit contributions. Thus, it is perfectly lawful for a campaign to not file a 48 hour notice for a contribution received before the 20th day before an election, but not deposited until 10 days later.

Respondent concedes that, assuming that the General Counsel is correct in her assertion that "an examination of the contribution check dates reveals 13 checks dated within the 48 hour reporting period," those checks may have been subject to the 48 hour notice requirement. Of course, notwithstanding a full two year audit and investigation, the Brief states this in conclusory fashion, and there still is no definitive statement as to whether or not the checks were actually received with the requisite period. They could, for example, have been received within 48 hours of the election, and thus not subject to the 48 hour notice requirement.

The General Counsel's Brief never says for sure, and thus only suggests a possible violation. But while such hypothetical possibility may create a reason to believe, it is well short of the standard at issue – probable cause that Respondent failed to file. Thus, there is no probable cause to believe that Respondent violated 2 U.S.C. § 434(a)(6)(A) by failing to file 48 hour notices.

III. CONCLUSION

As Respondent wrote to the auditors:

> In closing let me say that this whole process has been a real education for a first time congressional candidate like myself. FEC laws are cumbersome, complex and difficult, and while some mistakes were made, I believe the campaign substantively complied with all FEC laws and regulations. Our records, while not in perfect order, were in good condition as the audit staff has stated. My treasurer and I have

cooperated fully with the audit team and certainly have learned a lot. It has been a grueling process that has taken up my entire summer. The committee has no cash on hand, can no longer raise money and is closed down. Rest assured the process of this audit has proved to be significant punishment in and of itself. At times it has been more than I can bear. While I certainly remain cooperative with the Commission, I respectfully request that this matter be closed.

Respondent respectfully requests that the matter be closed.

Respectfully submitted,

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