MAY - 8 2001

BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

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

GENERAL COUNSEL'S REPORT # 3

I. ACTIONS RECOMMENDED

Find probable cause to believe that Benton for Congress and Don Benton, acting as treasurer, violated 2 U.S.C. §§ 441a(f), 434(a)(6)(A); and 11 C.F.R. § 103.3(b)(3), (4), (5).

II. BACKGROUND

On August 8, 2000, the Commission found reason to believe that Benton for Congress accepted and maintained excessive contributions in violation of 2 U.S.C. § 441a(f) and 11 C.F.R. § 103.3(b)(3), (4), and (5). The Commission also found reason to believe that the Committee failed to file 48-Hour notices in violation of 2 U.S.C. § 434(a)(6)(A). The Commission entered into pre-probable cause conciliation at that time. On October 2, 2000, the Committee indicated a willingness to settle all violations arising from this matter

On February 16, 2001, this Office sent the General Counsel's Brief to the Committee which submitted its Reply Brief on March 30, 2001.

III. ANALYSIS

This Office's analysis of this matter is contained in the General Counsel's Brief dated February 16, 2001. We incorporate the General Counsel's brief herein by reference.

A. Excessive Contributions

Respondents repeat certain facts underlying the previously addressed contention that there were no excessive contributions in this case.[2] Respondents contend that a lost redesignation or reattribution form can be cured by a subsequent writing by the contributor. Attachment 1 at 3. However, excessive contributions may only be cured if properly reattributed or redesignated within 60 days.[3] 11 C.F.R. § 103.3(b)(3). If supporting written evidence of a reattribution or redesignation within 60 days is not retained by a committee, "the redesignation or reattribution shall not be effective, and the original designation or attribution shall control." 11 C.F.R. § 110.1(l)(5).

Respondents also contend that "this case is about the technicalities of record-keeping. It is not a matter of knowingly accepting and retaining excessive contributions."[4] Attachment 1 at 4. However, in the absence of proper record keeping by a committee, the Commission's only alternative is to accept the original designation of the contributions and consequently, find that the Committee received and maintained excessive contributions. Therefore, the Office of

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[2] Specifically, Respondents state that the candidate personally discussed the redesignations and reattributions with each of the donors who also signed written declarations confirming their original intent. These signed statements, obtained following the audit fieldwork on June 18, 1999, were affirmations of prior intent to redesignate or reattribute the excessive contributions. However, they did not indicate whether the contributors signed original redesignation or reattribution forms within 60 days of the Committee's receipt of the contributions. 11 C.F.R. §§ 110.1(b)(5)(ii) and 110.1(k)(3).

[3] The regulations do not provide for the curing of defective or non-existent reattribution or redesignation forms. Respondents' failure to retain written redesignations or reattributions received within 60 days ensured the permanent tainting of the questionable contributions as excessive.

[4] All that is required for a violation of the "knowing" standard of 2 U.S.C. § 441a(f) is an intent to accept a contribution that is excessive. The word "knowingly" does not imply that the Committee had knowledge that it was violating the law. A federal case on point states that, "a 'knowing' standard, as opposed to a 'knowing and willful' one, does not require knowledge that one is violating a law, but merely requires an intent to act." *FEC v. John A. Dramesi for Congress Comm.*, 640 F.Supp. 985, 987 (D.N.J. 1986).

General Counsel recommends that the Commission find probable cause to believe that Benton for Congress and Don Benton, acting as treasurer, violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 103.3 (b)(3), (4), and (5) by knowingly accepting and retaining excessive contributions.

B. Failure to File 48-Hour Notices

In its Reply to the General Counsel's Brief, the Committee reaffirms its prior argument that there is no legal authority to use a contribution's date of deposit to assess whether it should have been reported on a 48-Hour Notice Form. The Committee also asserts that the Office of General Counsel is creating a presumption that all contributions are subject to the 48-Hour notice requirement and converting a technical recordkeeping mistake into a failure to file. Attachment 1 at 5.

Underlying respondents' argument is a presumption that the Commission may not consider any contributions as having been received within the 48-Hour notice period unless the Committee possesses records of receipt which show actual receipt within the period. Accepting this argument leads to the conclusion that a committee which keeps no records of receipt could not be penalized while another which does keep such records could be liable if its reports show a failure to report all 48-Hour notice contributions of which it has a record. Such a presumption would clearly undercut the rationale for the Commission's record-keeping regulations which require political committees to file 48-Hour Reports and also maintain the relevant underlying records upon which the reports are based.[5] 11 C.F.R. § 104.14(b)(1).

In the absence of any records indicating the date of receipt, the auditors had no other choice than to rely on the deposit date of the contributions at issue. Without this alternative,

[5] According to official Commission guidance, for each contribution of $1,000 or more received within the 48-Hour notice period, committees must provide the date of receipt. *See* Instructions for 48-Hour Notice of Contributions/Loans Received (FEC Form 6).

there would be no means to enforce the 48-Hour regulation and it would be more advantageous for committees not to keep any records of receipt. Admittedly, a particular contribution with a deposit date within the 48-Hour notice period is presumed as received during that period unless rebutted by evidence to the contrary. Thus, although it is perfectly lawful for a committee not to file a 48-Hour notice for a contribution received before the 20th day before an election, but not deposited until 10 days later, the committee should show that the actual date of receipt was before the 20th day. 11 C.F.R. § 104.14(b).

Despite Respondents' assertions to the contrary, the evidence indicates that the majority of the disputed contributions were received within the 48-Hour reporting period. Of the 32 contributions at issue, 13 were dated and deposited within the 48-Hour period.[6] Eight more were dated within three days prior to the start of the 48-Hour period. It is conceivable that the remaining 11 checks were received prior to the beginning of the reporting period, but not deposited until after the 20th day before the election.[7] However, there is strong evidence that a majority (21 out of 32) of the contributions were received within the 48-Hour reporting period. Although the facts are not as strong for the remaining 11 contributions, absent documentation to the contrary, it is still reasonable to consider the deposit date as indicative of the actual date of receipt.

Therefore, the Office of General Counsel recommends that the Commission find probable cause to believe that Benton for Congress and Don Benton, acting as treasurer, violated 2 U.S.C. § 434(a)(6)(A) by failing to file 48-Hour notices.

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[6] The fact that these 13 checks were dated and deposited within the 48-Hour period makes respondents' claim that they could have been received outside the period highly unlikely. Such a result could happen if all 13 contributors post-dated their checks prior to mailing them.

[7] The Committee is free to submit information during post-probable cause conciliation that supports its position that contributions were received outside of the 48-Hour period.

IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

V. RECOMMENDATIONS

1. Find probable cause to believe that Benton for Congress and Don Benton, acting as treasurer, violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 103.3 (b)(3), (4), and (5) by knowingly accepting and retaining excessive contributions.

2. Find probable cause to believe that Benton for Congress and Don Benton, acting as treasurer, violated 2 U.S.C. § 434(a)(6)(A) by failing to file 48-Hour notices.

3. Approve the attached conciliation agreement and appropriate letter.

Date 5/7/01

Lois G. Lerner
Acting General Counsel

Attachment:
1. Reply Brief
2. Conciliation Agreement

Staff assigned: Albert Veldhuyzen

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel SCM

DATE: May 8, 2001

SUBJECT: MUR 5066- General Counsel's Report #3

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

Open Session _____ Closed Session _____

CIRCULATIONS		DISTRIBUTION	
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72 Hour TALLY VOTE	☒	Open/Closed Letters	☐
		MUR	☐
24 Hour TALLY VOTE	☐	DSP	☐
24 Hour NO OBJECTION	☐	STATUS SHEETS	☐
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96 Hour TALLY VOTE	☐	RATING SHEETS	☐
		AUDIT MATTERS	☐
		LITIGATION	☐
		ADVISORY OPINIONS	☐
		REGULATIONS	☐
		OTHER	☐

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lois Lerner
Acting General Counsel

FROM Office of the Commission Secretary

DATE: May 11, 2001

SUBJECT: MUR 5066 - General Counsel's Report #3
dated May 7, 2001.

The above-captioned document was circulated to the Commission on **Tuesday, May 8, 2001.**

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	**XXX**
Commissioner Thomas	_
Commissioner Wold	**XXX**

This matter will be placed on the meeting agenda for

Tuesday, May 15, 2001.

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