

SENSITIVE

FEDERAL ELECTION COMMISSION
999 E. Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5125

DATE COMPLAINT FILED: October 25, 2000

DATE OF NOTIFICATION: November 1, 2000

DATE ACTIVATED: March 9, 2001

EXPIRATION OF STATUTE OF
LIMITATIONS: September 16, 2005

COMPLAINANT: Donald F. McGahn II, General Counsel
of the National Republican Congressional Committee

RESPONDENTS: Dr. Paul E. Perry
Paul Perry for Congress
and Jay Ziemer, as Treasurer
Indiana Medical Political Action Committee
and Barry Glazer, M.D., as Treasurer
Indiana Democratic Coordinated Campaign Committee
and Dennis M. Charles, as Treasurer

RELEVANT STATUTES: 2 U.S.C. § 441a
2 U.S.C. § 441f
11 C.F.R. § 110.6

INTERNAL REPORTS CHECKED: FEC Reports and Indices

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was generated by a complaint filed by Donald F. McGahn II, General Counsel of the National Republican Congressional Committee, who alleged that Dr. Paul E. Perry and Paul Perry for Congress collaborated with Indiana Medical Political Action Committee ("IMPAC") to launder a \$10,000 contribution through Indiana Democratic Party ("IDP") in violation of 11 C.F.R. § 110.6 and other election laws.

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2002 DEC 20 P 1:16

23-04-40-42

This Office received responses from all respondents, who are represented by separate counsel or are unrepresented.

II. FACTUAL AND LEGAL ANALYSIS

A. Complaint

Based on the affidavit of Dr. Robert Walker, who attended a September 16, 2000 annual IMPAC Board of Directors meeting, the complaint alleges that IMPAC agreed with Dr. Perry to launder a \$10,000 contribution to his congressional campaign through IDP.¹ In the affidavit, which was attached to the complaint, Dr. Walker stated that Dr. Perry was at the meeting and thanked the group for its prior \$5,000 contribution to his campaign. According to Dr. Walker's affidavit, members of the group acknowledged that IMPAC could not give Dr. Perry any more money because of federal regulations, so they passed a motion to make an additional \$10,000 contribution through IDP. The plan was to make the contribution in a way that would make it clear that it was for the benefit of Dr. Perry's campaign - IMPAC would draft a check for \$10,000 to IDP and give that check to Dr. Perry to deliver personally to IDP, thereby signaling that the money was intended for his campaign. As further evidence that the contribution was improper, Dr. Walker also claimed in his affidavit that the chairman of the meeting instructed all persons present not to remove any of the materials that had been distributed at the meeting. According to Dr. Walker's affidavit, he later confirmed his account of the meeting with another attendee, Betty Wolverton.²

¹ According to available information, IMPAC is a non-partisan political action committee made up of physician members of the Indiana State Medical Association. The Commission's records show that IMPAC has been registered as a political committee since at least 1975.

² The complaint did not include an affidavit or declaration from Ms. Wolverton.

B. Responses

1. Indiana Democratic Party

In its response to the complaint, IDP acknowledges receipt of the \$10,000 contribution but denies receiving any instructions from IMPAC.³ IDP also denies that it made any expenditure on behalf of any candidate at the request of IMPAC. Based on an affidavit from its Finance Director, Tim Henderson, who had authority to deposit contributions and to authorize and disburse expenditures on its behalf, IDP points out that the contribution arrived in a Federal Express ("FedEx") package on September 21, 2000 and was not accompanied by any instruction, designation, encumbrance or any other type of correspondence.⁴ According to IDP's response, the check had the notation "contribution" written in the memo line and had no reference to Dr. Perry.⁵ According to IDP, the check was deposited into its nonfederal account, since the check exceeded the \$5,000 federal contribution limit and Mr. Henderson did not know whether IMPAC was a federal political committee.

IDP acknowledged that it made two coordinated party expenditures on behalf of Dr. Perry's campaign after receipt of the contribution. It asserts that those expenditures were

³ The complaint identified Indiana Democratic Coordinated Campaign Committee ("IDCCC") as the recipient of the \$10,000 contribution, and this Office sent notice of the complaint to IDCCC as a respondent. IDP responded to the complaint on behalf of IDCCC, which does not appear on record as a separate entity. Review of the State of Indiana's campaign finance website shows that the \$10,000 contribution was received by Indiana Democratic State Central Committee ("IDSCC"), a nonfederal account of IDP, on September 21, 2000. Accordingly, all references to IDP in this report include IDCCC and IDSCC.

⁴ IDP did not provide any documents regarding the FedEx delivery.

⁵ Counsel provided a copy of the check dated September 18, 2000 and the deposit ticket. The check was made out to the IDCCC and showed no apparent designation to Dr. Perry's campaign.

23-04-406-0716

made in connection with a statewide, pre-defined get-out-the-vote plan that was designed at the outset of the general election. According to Mr. Henderson's affidavit, one of the expenditures was made on October 31, 2000 in the amount of \$3,795.90; the other expenditure was made on November 3, 2000 in the amount of \$104.00. According to Mr. Henderson, both expenditures were made in connection with multicandidate phone banks on behalf of federal and nonfederal candidates in Indiana, as part of IDP's statewide get-out-the-vote program pursuant to 2 U.S.C. § 441a(d). Commission records show that the expenditures were reported on Schedule F of the 2000 Post-Election Report of the Indiana Democratic Congressional Victory Committee, a federal account of IDP.⁶ Furthermore, according to IDP, even if IMPAC had intended that IDP "funnel" funds to Dr. Perry's campaign, IDP could not do so since it previously had contributed the \$5,000 legal maximum to Dr. Perry's campaign on August 7, 2000.⁷ Finally, IDP asserts that since the \$10,000 contribution was deposited into its nonfederal account, it could not have been expended, directly or indirectly, on behalf of Dr. Perry's campaign. Therefore, IDP asserts that there is no violation of election laws, and that the Commission should dismiss the complaint and take no further action.

⁶ However, the report shows the October 31, 2000 expenditure as \$3,735.90 not \$3,795.90 as stated in Mr. Henderson's affidavit.

⁷ The \$5,000 disbursement was disclosed at Schedule B of the 2000 October Quarterly Report, of IDP's Indiana Democratic Congressional Victory Committee. The contribution was also disclosed in Dr. Perry campaign's 2000 October Quarterly Report, Schedule A. However, the contribution was reported by the campaign as being received on August 30, 2000, not on August 7, 2000, as stated in IDP's response.

2. IMPAC

2 In its response, IMPAC acknowledges making the \$10,000 contribution but denies the
3 allegations in the complaint.⁸ Counsel for IMPAC denies any discussion of a desire or plan to
4 circumvent federal election laws or to earmark any funds through IDP for Dr. Perry's campaign.
5 Counsel emphasizes IMPAC's non-partisan nature and noted that it also made an identical
6 \$10,000 contribution to the Indiana Senate Republican Campaign Committee at the September
7 16, 2000 meeting.⁹ Further, counsel provided a copy of the minutes of the meeting and points
8 out that IMPAC approved contributions to other federal and state candidates, both Republican
9 and Democratic, at the meeting.¹⁰ Counsel asserts that there was never any discussion before,
10 during, or after the meeting of earmarking the contribution in any way. Counsel also asserts that
11 the complaint has provided no evidence to the contrary, noting that Dr. Perry had left the meeting
before IMPAC approved its contributions to the various federal and state candidates. Regarding
13 the complaint's suggestion of some impropriety from IMPAC's instruction not to remove

⁸ IMPAC's 2000 October Quarterly Report, Schedule B, shows a \$10,000 contribution to the IDCCC on September 18, 2000.

⁹ IMPAC's 2000 October Quarterly Report, Schedule B, shows the additional \$10,000 contribution to the State Republican Party on September 20, 2000. However, the recipient committee appears as the "Senate Majority Campaign," not the "Indiana Senate Republican Campaign Committee" as stated in IMPAC's response to the complaint. As with the contribution to the IDCCC, review of the State of Indiana's campaign finance website shows receipt of the \$10,000 contribution by the Senate Majority Campaign committee. That committee reported receipt of the contribution on October 11, 2000.

¹⁰ IMPAC's 2000 October Quarterly Report, Schedule B, shows the contributions to state candidates. The federal contributions appear on the 2000 October Quarterly Report, Schedule B, of American Medical Association Political Action Committee ("AMPAC"), an affiliated committee. According to IMPAC's Statement of Organization on file with the Commission, it is affiliated with AMPAC through a conciliatory agreement. AMPAC also appears on Commission indices as a connected organization to IMPAC. Commission records further show that on November 15, 1979 AMPAC entered into a conciliation agreement with the Commission, in which it was agreed that the state medical PACs and AMPAC are, in the aggregate, limited to \$5,000 contribution to each federal candidate for each election to federal office. As a result, all federal contributions are made through AMPAC. See MUR 253; *et al.* IMPAC's prior \$5,000 contribution to Dr. Perry's campaign on May 22, 2000 was disclosed in AMPAC's 2000 June Quarterly Report, Schedule B. According to Commission records, neither IMPAC nor AMPAC made federal contributions to IDP during the 2000 election cycle.

8170-904-40-22

materials from the meeting room, counsel points out that it is customary for IMPAC to limit the intentional or inadvertent distribution of sensitive legislative reports. Counsel also assailed Dr. Walker's affidavit as unreliable regarding its reference to conversations with Betty Wolverton, asserting that Dr. Walker's account of the conversations were unsubstantiated, unverifiable and clearly hearsay.¹¹ Counsel also reiterated that the IMPAC contribution was deposited into IDP's nonfederal account and was unavailable to Dr. Perry's campaign. Finally, counsel incorporated the response of IDP into IMPAC's response and requests that this matter be dismissed.

3. Dr. Perry and Paul Perry for Congress

In his response to the complaint on behalf of himself and his campaign, Dr. Perry acknowledges attending the September 16, 2000 IMPAC meeting, but denies any attempt to conceal, subvert, or otherwise circumvent federal campaign contribution limits. He denies that there was any discussion about passing through contributions to his campaign.¹² Rather, he asserts that he requested that IMPAC make a financial contribution to IDP on behalf of the statewide coordinated campaign. He states that, as a congressional candidate, he assisted in raising money for IDP so that the Governor's re-election campaign and the congressional races could coordinate some of their campaign field efforts.¹³ In support of his position, Dr. Perry also

¹¹ IMPAC provided concurring affidavits from two individuals who attended the meeting, Dr. Stephen Tharp and Dr. Barney Maynard, to counter Dr. Walker's affidavit in the complaint. Both affidavits confirmed the affiants' attendance at the meeting, advised that Dr. Perry had left the meeting prior to IMPAC's approval of the instant contribution, supported IMPAC's assertions concerning its nonpartisan contributions, and corroborated IMPAC's denial of a scheme to circumvent the contribution limits.

¹² Dr. Perry did not specifically address IMPAC's prior contributions to his campaign; however, his campaign disclosed receipt of the \$5,000 contribution from AMPAC in its 2000 July Quarterly Report, Schedule A.

¹³ Dr. Perry stated that he requested the contribution at issue on behalf of IDP's statewide Coordinated Campaign.

23-04-406-0719

pointed out that the contribution was placed in IDP's nonfederal account, and therefore was unavailable to his campaign, and that IMPAC made a similar \$10,000 contribution to the State Republican Party. He further asserts that the complaint was purely partisan, noting that Dr. Walker is a Republican closely associated with the campaign of Dr. Perry's opponent, John Hostettler, the Republican incumbent. Finally, Dr. Perry offers to cooperate with the Commission in resolving this matter.

C. Law

The Federal Election Campaign Act of 1971, as amended ("the Act") provides that no multicandidate political committee shall make contributions to any candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceed \$5,000. 2 U.S.C. § 441a(a)(2)(A). The Act also provides that, for purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. 2 U.S.C. § 441a(a)(8); *See also*, 11 C.F.R. § 110.6(a). The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient. *Id.*

The Commission regulations define "earmarked" to mean a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee. 11 C.F.R. § 110.6(b)(1). "Conduit or intermediary" is defined as any person who receives and forwards an earmarked contribution to a

23-04-406-0720

candidate or a candidate's authorized committee, except as provided otherwise. 11 C.F.R.

§ 110.6(b)(2).

The Act permits the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, to make additional expenditures in connection with the general election campaign of candidates for Federal office beyond those set forth in 2 U.S.C. § 441a(a), subject to certain limitations.¹⁴ 2 U.S.C.

§ 441a(d)(1):

The Act provides that no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person. 2 U.S.C.

§ 441f. The Commission's regulations also provide that no person shall knowingly help or assist any person in making a contribution in the name of another. 11 C.F.R. § 110.4(b)(1)(iii).

D. Analysis

To determine whether there is reason to believe that respondents violated the Act based on the complaint, it must be shown that the \$10,000 contribution at issue was earmarked for

¹⁴ These expenditures are called "coordinated party expenditures" or "441a(d) expenditures" and are made on behalf of federal candidates. The expenditure limits are based on a prescribed formula and are published by the Commission each election year. See 2 U.S.C. § 441a(d)(3). See also, Federal Election Commission's *Campaign Guide for Political Party Committees*, August 1996, Chapter 4, at 16. In 2000, the coordinated party expenditure limit for congressional candidates was \$33,780, except for candidates in states with only one congressional district. See *FEC Record*, March 2000 at 14. A national or state party committee may assign all or part of its expenditure limits to another party committee. 11 C.F.R. § 110.7(a)(4) and § 110.7(c).

23-04-406-0722

1 Dr. Perry's campaign.¹⁵ Although the available information clearly establishes that the
2 contribution was made, it does not appear to show that the contribution was earmarked for Dr.
3 Perry's campaign. Other than the bare allegations in Dr. Walker's affidavit, the complaint does
4 not show any designation, instruction, or encumbrance on the contribution.¹⁶ The documentary
5 evidence also does not support complainant's assertions. A copy of the contribution check
6 provided by respondents showed no apparent designation to a particular candidate or committee.
7 On the other hand, Respondents denied the earmarking allegations in the complaint and provided
8 sworn affidavits of two other attendees disputing Dr. Walker's account of the meeting. In
9 particular, respondents denied that Dr. Perry personally delivered the contribution and asserted
10 that the contribution was delivered by FedEx without any designation, instruction or
11 encumbrance as to its use.¹⁷

12 Even if the information showed that the contribution was intended for Dr. Perry's
13 campaign, it must also be shown that all or part of the contribution was actually used on behalf of
14 him or his campaign to constitute earmarking. 11 C.F.R. § 110.6(b)(1). The available
15 information does not appear to indicate such use. IDP asserts, and its disclosure report shows,
16 that the \$10,000 contribution was deposited into its nonfederal account. Considering that

¹⁵ If earmarking can be established, it would implicate violations of 2 U.S.C. § 441a, and possibly § 441f. Based on the disclosure reports, IDP does not appear to have exceeded its coordinated party expenditure limit of \$33,780 for Dr. Perry's campaign and would not be in violation of 2 U.S.C. § 441a(d). According to disclosure reports on file with the Commission, the national and state Democratic parties made a total of \$39,236 in coordinated party expenditures on behalf of Dr. Perry's general election campaign. As discussed in footnote 14 above, the combined coordinated party expenditure limit for national and state Democratic parties was \$67,560 (\$33,780 x 2) for Dr. Perry's campaign. In this instance, the \$39,236 combined total coordinated party expenditures on behalf of Dr. Perry's general election campaign consisted of the \$3,839.90 total expenditure by IDP and \$35,396.11 by the Democratic Congressional Campaign Committee, using a small portion of IDP's limit.

¹⁶ Although Dr. Walker asserted in his affidavit that another attendee, Betty Wolverton, confirmed his assertions, she did not provide an affidavit or declaration to this Office.

¹⁷ Respondents did not provide documentation of the FedEx delivery.

deposit, IDP correctly asserts that it could not have used the contribution legally for Dr. Perry's campaign, even if it wanted to. The available information does not show that any part of the contribution was used directly or indirectly from IDP's nonfederal account on behalf of Dr. Perry's campaign.

IDP acknowledges making two coordinated party expenditures under 2 U.S.C. § 441a(d) on behalf of Dr. Perry's campaign after receipt of the contribution. IDP's disclosure reports show federal coordinated party expenditures of \$3,735.90 on October 31, 2000 and \$104 on November 3, 2000 to Dr. Perry's campaign. According to IDP, the expenditures to Dr. Perry's campaign were made in connection with a prior statewide get-out-the-vote "coordinated campaign" plan, namely phone banks on behalf of multiple federal and nonfederal candidates.¹⁸ IDP pointed out that the expenditures were independent of the \$10,000 contribution and were not made at the request of IMPAC.

The available information does not indicate that the coordinated party expenditures resulted from, or were influenced by, IMPAC's \$10,000 contribution, and therefore, appears to support IDP's assertion that the expenditures were independent of the contribution. In his response to the complaint Dr. Perry acknowledged requesting the contribution from IMPAC for IDP's statewide Coordinated Campaign, and the contribution check was made out accordingly to that endeavor. As noted previously, the check was made out to "Indiana Democratic Coordinated Campaign Committee." In addition, IDP disclosed the party coordinated expenditures to the Commission. Further, IMPAC asserted, and its disclosure reports show, that it made a similar \$10,000 contribution to the state Republican Party. Finally, the disclosure reports support

¹⁸ Consistent with IDP's assertions, IDP's disclosure reports also show identical coordinated party expenditures of \$104 on November 3, 2000 on behalf of several other federal candidates.

IMPAC's assertion that it is non-partisan and that it contributes to both Democratic and Republican candidates and committees.

The available information does not appear to support complainant's assertion of earmarking and does not appear to warrant further investigation. Since the available information does not appear to show that all or part of the \$10,000 contribution was used on behalf of Dr. Perry or his campaign, the lack of documentation regarding the FedEx delivery of the contribution appears immaterial. In addition, further investigation of this matter may be fruitless. As the information shows that the contribution was deposited in IDP's nonfederal account, it appears unlikely that any link between IDP's \$3,839.90 in coordinated party expenditures and IMPAC's \$10,000 contribution can be established. In sum, this Office concludes that the allegations in the complaint are sufficiently refuted by the available information to warrant a no reason to believe finding. Considering the totality of the available information and the minimal amount involved, further enforcement action does not appear to be a prudent use of Commission resources.¹⁹

Accordingly, this Office recommends that the Commission find no reason to believe that Dr. Paul E. Perry; Paul Perry for Congress and Jay Ziemer, as Treasurer, Indiana Medical Political Action Committee and Barry Glazer, M.D., as Treasurer, Indiana Democratic Coordinated Campaign Committee and Dennis M. Charles, as Treasurer, violated 2 U.S.C. §§ 441a and 441f, and 11 C.F.R. § 110.6 with respect to the allegations in this complaint.

¹⁹ This Office notes that in MUR 4643, the Commission approved this Office's recommendation to find no reason to believe regarding allegations of earmarking when there was no indication in the record that individual contributors directed or controlled their contributions or took any action that might constitute a designation or instruction that their contributions be spent on behalf of a particular candidate. See MUR 4643 (Democratic Party of New Mexico), First General Counsel's Report dated June 29, 1999 at 20-21.

44-0000-0724

III. RECOMMENDATIONS


1. Find no reason to believe that Dr. Paul E. Perry violated 2 U.S.C. §§ 441a and 441f, and 11 C.F.R. § 110.6.
2. Find no reason to believe that Paul Perry for Congress and Jay Ziemer, as Treasurer, violated 2 U.S.C. §§ 441a and 441f, and 11 C.F.R. § 110.6.
3. Find no reason to believe that Indiana Medical Political Action Committee and Barry Glazer, M.D., as Treasurer violated 2 U.S.C. §§ 441a and 441f, and 11 C.F.R. § 110.6.
4. Find no reason to believe that Indiana Democratic Coordinated Campaign Committee and Dennis M. Charles, as Treasurer, violated 2 U.S.C. §§ 441a and 441f, and 11 C.F.R. § 110.6.
5. Approve the appropriate letters.
6. Close the file.

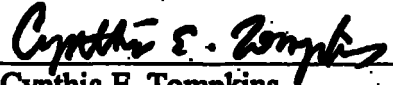
Lawrence H. Norton
General Counsel

12/20/02
Date

BY:

FOR:


Rhonda J. Vosdinger
Associate General Counsel
for Enforcement


Cynthia E. Tompkins
Assistant General Counsel


Kamau Philbert
Attorney