

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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CASE CLOSURES UNDER
ENFORCEMENT PRIORITY

SENSITIVE

GENERAL COUNSEL'S REPORT

FEB 10 2002

I. INTRODUCTION

EXECUTIVE SES

The cases listed below have been evaluated under the Enforcement Priority System ("EPS") and identified as low priority, stale, ADR transfers, or the statute of limitations has expired. This report is submitted in order to recommend that the Commission no longer pursue these cases for the reasons noted below.

II. CASES RECOMMENDED FOR CLOSURE

A. Cases Not Warranting Further Action Relative to Other Cases Pending Before the Commission

EPS was created to identify pending cases that, due to the length of their pendency in inactive status, or the lower priority of the issues raised in the matters relative to others presently pending before the Commission, do not warrant further expenditures of resources. Central Enforcement Docket ("CED") evaluates each incoming matter using Commission-approved criteria that result in a numerical rating for each case.

Closing ~

these cases permits the Commission to focus its limited resources on more important cases presently pending in the Enforcement docket. Based upon this review, we have identified cases that do not warrant further action relative to other pending matters. We recommend that cases be closed.¹

¹ These cases are: RR011-08 (*Americans for a Republican Majority*); MUR 5097R (*Nielsen for Congress*) (this case was transferred to the ADR Office by the Commission on April 4, 2001 and subsequently returned to OGC on October 1, 2001); MUR 5209 (*Russ Francis for Congress*); MUR 5210 (*Nora Lucero*); MUR 5220 (*Engel for Congress*); MUR 5221 (*The Hugh Hewitt Program*); MUR 5223 (*National Council for Republican Congress*), and MUR 5224 (*The Boston Globe*).

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B. Stale Cases

Effective enforcement relies upon the timely pursuit of complaints and referrals to ensure compliance with the law. Investigations concerning activity more remote in time usually require a greater commitment of resources primarily because the evidence of such activity becomes more difficult to develop as it ages. Focusing investigative efforts on more recent and more significant activity also has a more positive effect on the electoral process and the regulated community. EPS provides us with the means to identify those cases that, though earning a higher numerical rating, remain unassigned for a significant period due to a lack of staff resources for an effective investigation. The utility of commencing an investigation declines as these types of cases age, until they reach a point when activation of such cases would not be an efficient use of the Commission's resources.

We have identified cases that have remained on the Central Enforcement Docket for a sufficient period of time to render them stale. We recommend that three cases be closed³

³ These cases are: MUR 5000 (*Sanders for Congress*); MUR 5115 (*7-Eleven, Inc.*); and MUR 5145 (*Unknown Respondents*).

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C. Expired Statute of Limitations

On December 26, 1996, the United States Court of Appeals for Ninth Circuit issued a decision in *Federal Election Commission v. Williams*, 104 F.3d 237 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997). That decision held, *inter alia*, that the five-year statute of limitations for filing suit to enforce a civil penalty established at 28 U.S.C. § 2462 applied not only to judicial proceedings to enforce civil penalties already imposed, but also to proceedings seeking the imposition of these penalties, including the Commission's law enforcement suits under 2 U.S.C. § 437g(a)(6). We have identified two cases, MUR 5109R (*Steve Chabot for Congress*)⁵ and MUR 5228 (*Randy Borow*), which are affected by the application of the five-year statute of limitation. We recommend that these matters be closed.

⁵ This case was transferred to the ADR Office by the Commission on April 3, 2001 and subsequently returned to OGC on January 28, 2002.

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IV. EPS DISMISSALS PENDING RESOLUTION OF AFL

Pursuant to the discussions at the January 29, 2002 and February 12, 2002 Executive Sessions and consistent with the memoranda from this Office to the Commission dated February 7, 2002 and March 5, 2002, concerning the "Supplemental Information and Revised Recommendations Concerning Post-Case Closing Procedures – MUR 5119" and "Public Record in Certain Closed Enforcement Cases," this Office recommends the following procedures be adopted in case closings under the Enforcement Priority System, consistent with the district court's decision in *AFL-CIO v. FEC*, 177 F. Supp.2d 48 (D.D.C. 2001), *appeal docketed*, No. 02-5069 (D.C. Cir. Feb. 28, 2002):

1. Where a case is dismissed through the Enforcement Priority System as low-rated, the complainant and respondent(s) will receive a closing letter similar to those that were sent in MUR 5119 (*Friends of John Hostettler*) and a narrative of the MUR prepared by the General Counsel's Office (*see* attachment 1). The narrative will be redacted to remove the case score. This procedure is consistent with the Commission's current practice.
2. Where a case is dismissed through the Enforcement Priority System as stale, the complainant and respondent(s) will receive only a closing letter similar to those that were sent in MUR 5119 (*Friends of John Hostettler*). This procedure is consistent with the Commission's current practice.
3. Where a case is recommended for closure under the Enforcement Priority System, but the Commission votes either to find reason to believe and take no further action or no reason to believe and closes the file, the complainant and respondent(s) will receive a closing letter similar to those that were sent in MUR 5119 (*Friends of John Hostettler*), a Statement of Reasons⁶ prepared by the Commission and a copy of the certification of the Commission's vote. This procedure is consistent with the Commission's current practice.

⁶ Although the complainant will receive a letter at the time the case is closed, the Statement of Reasons serves as the explanation of the Commission's action for 2 U.S.C. § 437g(a)(8) purposes.

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4. Where a case is dismissed through the Enforcement Priority System as either stale or low-rated, the public record will contain a redacted copy of the General Counsel's Report, including a redacted narrative of the MUR prepared by the General Counsel's Office (see attachments 1 and 2), and the certification of the Commission's vote. This procedure is a change from the current Commission practice, which, in addition to the above, releases the notification and closing letters.

5. Where a case is recommended for closure under the Enforcement Priority System but the Commission votes either to find reason to believe and take no further action or no reason to believe and closes the file, the public record will contain a Statement of Reasons prepared by the Commission and the certification of the Commission's vote. This procedure is a change from the current Commission practice, which, in addition to the above, releases the notification and closing letters.

V. RECOMMENDATIONS

OGC recommends that the Commission exercise its prosecutorial discretion and close the cases listed below effective two weeks from the day that the Commission votes on the recommendations. Closing these cases as of this date will allow CED and the Legal Review Team the necessary time to prepare closing letters and case files for the public record.

1. Decline to open a MUR, close the file effective two weeks from the date of the Commission vote, and approve the appropriate letter in:

1. RR01L-0S

2. Take no action, close the file effective two weeks from the date of the Commission vote, and approve the appropriate letters in:

MUR 5000

MUR 5097R

MUR 5109R

MUR 5115

MUR 5145

MUR 5209

MUR 5210

MUR 5220

MUR 5221

MUR 5223

MUR 5224

MUR 5228

4/3/02
Date

Lawrence H. Norton
Lawrence H. Norton
General Counsel

22-04-405-3877

MUR 5221
THE HUGH HEWITT PROGRAM

Complainant, Sidney Gold, alleges that Hugh Hewitt of the Hugh Hewitt Program solicited viewers to make contributions to several candidate committees, including the campaigns of Norm Coleman for U.S. Senate Committee, Ganske for Senate Committee, and Hutchinson for Senate Committee. The complaint further alleges that Mr. Hewitt suggested that viewers send their tax refund checks directly to the Norm Coleman for U.S. Senate Committee and provided an address where such contributions could be forwarded.

The Norm Coleman for U.S. Senate Committee responded by stating that the activities described in the complaint were protected by the press exemptions under the federal election laws and regulations. Furthermore, the respondent noted that the complaint failed to allege that its committee played any role in the activities attributed to Mr. Hewitt and, therefore, the action against the committee should be dismissed.

The Ganske for Senate Committee responded by stating that it never coordinated any form of fundraising activity with Mr. Hewitt or the Radio station, KRLA in Los Angeles; and therefore, the action should be dismissed.

The Hutchinson for Senate Committee responded by stating, "we have no control over the speech of Mr. Hugh Hewitt. We have not ever nor will we in the future attempt to control the speech of Mr. Hugh Hewitt."

The Radio Station KRLA, the Hugh Hewitt Program, Salem Radio Network, Inc., as producer & distributor of the Hugh Hewitt Program, and New Inspiration Broadcasting Company, Inc., jointly filed a response stating that the activities in producing, distributing, and broadcasting the Hugh Hewitt Program are protected from the scrutiny of the Federal Election Commission by the press freedom clause of the First Amendment to the Constitution of the United States. Further, the respondents are not owned or controlled by any political party, committee, or candidate and the broadcast at issue was a commentary in the regular course of media activity.

This matter is less significant relative to other matters pending before the Commission.

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