

FEB 24 2004

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

999 E Street, N.W.
Washington, D.C. 20463
2004 FEB 24 P 4: 32

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5251

DATE COMPLAINT FILED: March 19, 2002

DATE OF NOTIFICATION: March 26, 2002

DATE ACTIVATED: July 30, 2002

EXPIRATION OF SOL: April 1, 2005

COMPLAINANT:

Steven J. Durham

RESPONDENTS:

Friends of Joe Rogers Exploratory Committee, now
known as Friends of Joe Rogers, and
Angela Wilhite, as treasurer
Joe Rogers
State of Colorado
Wells Fargo Corporation

RELEVANT STATUTES:

2 U.S.C. § 432(e)(1)
2 U.S.C. § 432(i)
2 U.S.C. § 433(a)
2 U.S.C. § 434(a)
2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.7
11 C.F.R. § 100.8
11 C.F.R. § 101.3
11 C.F.R. § 104.3(a)(4)(i)
11 C.F.R. § 104.7

INTERNAL REPORTS CHECKED:

Disclosure Reports, RFAs

FEDERAL AGENCIES CHECKED:

None

1 **I. INTRODUCTION**

2
3 On January 22, 2002, Colorado Lieutenant Governor Joe Rogers filed as a candidate for his
4 party's nomination in Colorado's newly created Seventh Congressional District.¹ The complaint in
5 this matter alleges that the Friends of Joe Rogers Exploratory Committee, now known as Friends of
6 Joe Rogers ("the Committee"), failed to file a timely Statement of Candidacy ("FEC Form 2") in
7 violation of the Federal Election Campaign Act of 1971, as amended ("the Act").² Complaint at 1-
8 2. The complaint also states that the Committee included \$104,295 in unitemized contributions in
9 its disclosure reports for 2001, roughly 56% of the Committee's contributions received, and
10 suggests that the \$26,000 in missing funds for the 2000 Lieutenant Governor's Conference on
11 Youth Education could have been transferred into the Committee account and concealed as
12 unitemized contributions. *Id.*

13 The complaint also alleges that on January 24, 2002, Rogers admitted that he violated the
14 law by using state money to pay for a campaign videotape and for a phone for his campaign. *Id.*
15 The State Auditor conducted an audit of the lieutenant governor's office relating to this spending
16 activity, concluding that Rogers' office had lax accounting practices, significant staff turnover and

¹ In 1996, Rogers unsuccessfully ran in the First Congressional District, and the Federal Election Commission ("Commission") conducted an audit of the Committee pursuant to 2 U.S.C. § 438(b). The Commission found apparent excessive contributions totaling \$21,085, over \$36,000 in unreported in-kind contributions (no in-kind contributions were reported), \$22,450 in individual contributions that failed to have employer and/or occupational information, incomplete disclosure reports for \$80,518 in disbursements, political committee contributions that were not itemized, political committee contributions lacking sufficient address information, and over \$15,000 in apparent personal use of campaign funds, etc. 2 U.S.C. §§ 441a(a)(1), 432(c)(5) & (d) and 434(b)(4)(A) & (5)(A). Rogers served as the Lieutenant Governor of Colorado until January 2003.

² All of the facts in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Act herein are as it read prior to the effective date of BCRA and all citations to the Commission's regulations herein are to the 2002 edition of Title 11, Code of Federal Regulations, which was published prior to the Commission's promulgation of any regulations under BCRA.

1 poor management. Attachment 1. The audit determined that Rogers' office made approximately
2 \$1,200 in inappropriate disbursements for political activities. *Id.* at 7-8.

3 After reviewing the facts in this matter, this Office is not persuaded that the allegations in
4 the complaint support an investigation. The bulk of the allegations are not supported by facts
5 showing any violation of the Act. While Rogers appears to have become a candidate about two
6 months prior to registering and filing reports with the Commission, his actions are not as egregious
7 as previous matters investigated by the Commission, where candidates clearly were no longer
8 "testing the waters" months prior to filing with the Commission. We believe Rogers' actions more
9 appropriately merit an admonishment.

10 **II. FACTUAL AND LEGAL ANALYSIS**

11 **A. Testing the Waters**

12 An individual becomes a candidate for federal office, subject to registration and reporting
13 requirements pursuant to the Act, when the individual's campaign exceeds \$5,000 in contributions
14 or expenditures. 2 U.S.C. § 431(2). Commission regulations allow an individual who has not made
15 a decision to run for office the opportunity to raise funds before registering, known as "testing the
16 waters." 11 C.F.R. §§ 100.7(b) and 100.8(b). *See* AO 1998-18. When an individual takes actions
17 relevant to conducting a campaign or indicates that he or she has decided to become a candidate for
18 a particular office, he or she must designate a principal campaign committee, which must file
19 periodic reports that include all reportable funds received from the time the individual begins
20 "testing the waters." 2 U.S.C. § 432(e)(1); *see also* 11 C.F.R. § 101.1(a).

1 **1. Facts**

2 According to disclosure reports, the Committee began collecting receipts, making
3 disbursements, and engaging in activities associated with the preparation for a campaign (e.g.,
4 hosting a reception) as early as March 2001. The Committee's first filed report, the 2001 Year-End
5 Report, disclosed over \$5,000 in disbursements as of August 5, 2001, thereby exceeding the
6 threshold of 2 U.S.C. § 431(2). The majority of Rogers' financial and political activity occurred in
7 November and December of 2001.

8 On November 19, 2001, Rogers made spoken and written statements about his campaign.
9 At a November 19, 2001, fundraiser, Rogers reportedly said "I want to be your congressman and
10 need your help to win the seat." *Rogers' 'Testing' Gets Pretty Deep*, Denver Post Jan. 6, 2002. A
11 November 19, 2001, fundraising letter submitted by the Committee and signed by Rogers, states:

12 I know that I will effectively serve your interests in Congress and that because of the close
13 working relationship with the President and the leadership of Congress that I will
14 immediately work for the benefit of Colorado. Won't you please fill out the enclosed reply
15 card indicating how you can help my campaign?
16 (emphasis in original).

17 In the same letter, Rogers wrote:

18 [T]he early contributions are what help candidates get organized so they can run the most
19 effective campaigns. That's why I am asking for your help now, nearly a year before the
20 general election. If you would send your check or complete the enclosed credit card
21 donation form within the next day or two, you will help me jump-start my campaign
22 treasury.
23 (emphasis in original).

24 The letter closes: "[T]hank you in advance for your help in this new campaign. With your support I
25 look forward to serving you in the next United States Congress." Friends of Joe Rogers Exploratory
26 Committee Response at Exhibit B.

1 In early January 2002, newspaper accounts began questioning whether Rogers was still only
2 testing the waters. *See Rogers' 'Testing' Gets Pretty Deep*, Jan. 6, 2002. On January 22, 2001, the
3 Committee filed a Statement of Organization.³ On January 31, 2002, the Committee filed its 2001
4 Year-End Report. The primary election was held on August 13, 2002.

5 2. Analysis

6 On August 5, 2001, Rogers met the \$5,000 threshold for the definition of a candidate. It
7 appears, however, that he was still testing the waters at that time. Publicly available information
8 indicates that Rogers had not yet indicated that he was a candidate for office, nor had he taken
9 actions indicating that he was conducting a campaign. When an individual makes oral or written
10 statements indicating that he or she is a candidate for a particular office, the individual becomes a
11 candidate subject to the reporting requirements of the Act. *See* 11 C.F.R. § 100.7(b)(1)(i). Rogers
12 apparently crossed over from testing the waters to candidacy status no later than November 19,
13 2001. Rogers' spoken and written statements not later than November 19, 2001 appear to indicate
14 that he had decided to become a candidate. Rogers' reported statement at the fundraiser already
15 refers to winning the seat in Congress. His letter tells recipients what he will do in Congress, and
16 states in the third person how candidates need early contributions to organize and run their
17 campaigns, which in the next sentence, Rogers states is the reason he needs the recipient's help. He
18 concludes by stating how he looks forward to serving the recipient in Congress. The letter and his
19 statement at the fundraiser appear to indicate an intention to run for Congress.

20 The Act, therefore, required Rogers to designate his principal campaign committee no later
21 than December 4, 2001, and the committee was required to file a Statement of Organization no later

³ Rogers never filed a Statement of Candidacy designating his principal campaign committee. The Statement of Organization, however, listed the name of his principal campaign committee.

1 than December 14, 2001. 2 U.S.C. §§ 432(e)(1) and 433(a). The Commission never received a
2 designation of the principal campaign committee and the Committee filed its Statement of
3 Organization five weeks late.

4 In past matters, individuals who had alleged they were testing the waters and who signed
5 agreements with the Commission admitting that they violated 2 U.S.C. § 432(e)(1) took actions
6 clearly indicating their candidacy. MUR 5363 (Al Sharpton); MUR 2262 (Pat Robertson). In MUR
7 5363, Sharpton achieved candidate status through his book, published months prior to filing for
8 candidate status, referring to himself as a candidate for President. Sharpton also participated in a
9 debate exclusively for presidential candidates during the period in which he claimed that he was
10 testing the waters. In MUR 2262, Robertson made a thirty-minute speech in a \$4 million satellite
11 broadcast that also included individuals voicing their support for Robertson's presidential
12 candidacy.

13 In contrast, while some of Rogers' statements and campaign materials indicate his
14 anticipation of serving in Congress, his actions present less serious violations than those in other
15 matters.⁴ In MUR 5297 (John Wolfe) and MUR 5363, the candidates registered and filed reports
16 with the Commission about five and six months respectively, after being required to do so. In MUR
17 2262, Robertson registered and filed reports with the Commission one year late. Rogers'
18 committee, in contrast, filed a Statement of Organization with the Commission about five weeks
19 after being required to file. Furthermore, the Rogers Committee filed the 2001 Year-End Report, its
20 first required disclosure report, on time on January 31, 2002, or nine days after the untimely
21 Statement of Organization. Accordingly, this Office recommends the Commission find reason to

⁴ Rogers raised \$186,000 prior to filing his Statement of Organization. While this is a substantial sum, the Commission has recognized in prior matters that raising even \$200,000 in funds while testing the waters is not unusual, given the tremendous resources needed to fund a campaign. MUR 2710 (Judge Harvey Sloane).

1 believe Joe Rogers violated 2 U.S.C. § 432(e)(1), and Friends of Joe Rogers Exploratory
2 Committee, now known as Friends of Joe Rogers, and Angela Wilhite, as treasurer, violated
3 2 U.S.C. § 433(a). This Office further recommends the Commission admonish Joe Rogers, Friends
4 of Joe Rogers Exploratory Committee, now known as Friends of Joe Rogers, and Angela Wilhite, as
5 treasurer, and take no further action as to each of these respondents.

6 **B. Unitemized Contributions**

7 **1. Generally**

8 The complaint alleges that Rogers may have reported illegal contributions as unitemized
9 contributions. Complaint at 2; *See* discussion *infra*, pp. 8-10. In its Amended 2001 Year-End
10 Report covering the period from January 1, 2001 through December 31, 2001, the Committee
11 reported over \$104,000 in unitemized contributions. Additionally, in its April 2002 Quarterly
12 Report, the committee reported over \$70,000 in unitemized contributions. Committees need not
13 report as itemized contributions the identification of individuals whose contributions aggregate
14 \$200 or less in an election cycle. 2 U.S.C. § 434(b)(3)(A) and 11 C.F.R. §§ 101.3 & 104.3(a)(4)(i).

15 In response to the complaint, the treasurer of the Committee stated that these contributions
16 were all less than \$200, and that the Committee had attempted to file the names of these smaller
17 donors but that the Commission's computer system did not show these smaller contributions.⁵
18 Commission records show that the Committee did not disclose a list of these smaller donors.
19 Instead, the Committee reported a lump sum of \$104,295.⁶ Committee response at 6; *See*

⁵ No separate response was received from Rogers.

⁶ The Commission's Information Technology Division confirmed that the electronic filing software automatically totals contributions less than \$200 and reports them as an unitemized lump sum amount on the disclosure report. The Commission cannot access the individual unitemized contributions entered by the Committee. The Committee could have overridden this option, but would have had to override each contribution of less than \$200 when electronically entering each contribution. The Committee was not required to select this option.

supra, p. 7.

News accounts indicate that the campaign participated in a lot of direct mail fundraising. A newspaper article reported that the majority of these unitemized contributions were generated by 4,000 letters sent out by the Committee, in addition to other contributors who received letters from other public officials and political committees. *Rogers Won't Reveal Small Donors*, Denver Post, March 4, 2002. The Denver Post asked the Committee to view the names and contribution amounts privately, but reported that the Committee refused. *Id.* The Committee's 2001 Year-End Report and 2002 April Quarterly Report show significant disbursements for printing, postage and other costs associated with direct mailings. The news accounts and disclosure reports would appear to indicate that these unitemized contributions resulted from a large number of small contributions made in response to direct mail fundraising.

2. Youth Conference

Additionally, the complaint alleges that \$26,000 in missing funds from the Lieutenant Governor's Youth Conference may have been transferred into the Committee's account, and speculates that these funds may have been reported as unitemized contributions. Complaint at 2. Newspaper articles included in the complaint state that Rogers could not account for up to \$26,000 in funds raised for the Conference, and also stated that Rogers was reimbursed for travel, photo equipment and meals. *Rogers Used Cash From Youth Event*, Denver Post, Mar. 3, 2002. Several businesses made approximately \$65,000 in donations to the youth conference, including \$10,000 by Wells Fargo Corporation.⁷

⁷ Other corporate contributors have been identified as donors to the youth conference; however, since this Office has not found evidence of funds intended for the youth conference being used on behalf of a political campaign, this Office is not recommending that these corporations be generated as respondents.

1 This allegation, based on speculation, is partially refuted by the same newspaper relied on in
2 the complaint. An article published two days later states that Rogers accounted for the \$26,000 in
3 funds. *Rogers Accounts For Remainder Of Youth Funds*, Denver Post, March 5, 2002.⁸ Of these
4 funds, \$15,005 was paid in settlement of a lawsuit filed by a company that claimed it had been
5 uncompensated for its work on the conference. Rogers apparently maintained that the remaining
6 amount was used to reimburse him for conference expenses. *Id.* Although Rogers could produce
7 receipts to account for only about half of those expenses, we can find no substantive evidence that
8 Rogers or the Committee knowingly received prohibited contributions from the youth conference or
9 from any businesses that contributed to the youth conference. The findings in the state auditor's
10 report and the Commission's own experience with Rogers' past committee reveal a history of
11 sloppy, but not willfully deceptive, bookkeeping practices. *See supra*, note 1. Additionally, we
12 were unable to find any evidence indicating that the sources of the unitemized contributions were in
13 violation of the Act, nor was this Office able to find any evidence that the amount of any unitemized
14 contributions exceeded the \$200 per contributor threshold.

15 Accordingly, this Office recommends that the Commission find no reason to believe Wells
16 Fargo Corporation violated 2 U.S.C. § 441b. This Office further recommends the Commission find
17 no reason to believe that Joe Rogers violated 2 U.S.C. § 441a(f) as it pertains to unitemized
18 contributions. This Office also recommends the Commission find no reason to believe that Friends
19 of Joe Rogers Exploratory Committee, now known as Friends of Joe Rogers, and Angela Wilhite, as
20 treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f) as they pertain to unitemized contributions.

⁸ This article appeared two weeks prior to the filing of the complaint.

1 **C. State Money for Political Expenses**

2 The complaint alleges that Rogers admitted he inappropriately used state funds to pay for
3 two campaign-related expenses. Complaint at 2. One of these expenses, according to the
4 complaint, is a videotape of his potential opponent for U.S. Congress. Complaint at 2. The other
5 alleged expense was a telephone line for calls related to his federal campaign. *Id.* The complaint
6 supports its allegation with a newspaper article stating that the lieutenant governor's office spent
7 \$55,000 on "unconventional items." *Id.* The newspaper article reports that of these expenses, \$110
8 was spent on a telephone line for his office and \$90 on a video clip of a future political opponent of
9 Rogers. *Rogers Defends Spending, Denies Misdeeds*, Denver Post, Jan. 24, 2002. The Complaint
10 also states that the state auditor was conducting an audit of these expenses. Complaint at 2.

11 The phone line apparently was set up for the Republican Lieutenant Governor's
12 Association, and other "party-related functions" and not for Rogers' campaign. *Lieutenant*
13 *Governor Defends Spending*, Rocky Mountain News, Jan. 24, 2002. The phone line, which cost
14 \$110, was originally billed to "Coloradans for Joe Rogers," a non-federal committee, but paid for by
15 the state. *Id.* The phone line, therefore, did not appear to benefit Rogers' campaign or any other
16 federal campaign.

17 The video clip, which cost about \$90, was a news story involving the state treasurer's
18 payment of a fine for violating state election laws. *Id.* Reimbursement for the video clip appears to
19 have been a billing error that the Committee asserts has been corrected. Committee response at 7-8
20 and Exhibit H. The vendor submitted a memo to the lieutenant governor's office acknowledging
21 the vendor's error and including what appears to be a corrected invoice showing the item shipped to
22 the Committee and stamped "paid." *Id.* at Exhibit H. The Committee asserts "the funds [were]
23 reimbursed to the State consistent with Colorado law." *Id.* at 8. The State of Colorado is a person

1 pursuant to the Act. 2 U.S.C. § 431(11). The State of Colorado appears to have made a \$90
2 contribution to Rogers' campaign when it paid for the video clip; however, this contribution is not
3 excessive.⁹ *Id.*

4 A Colorado state auditor's report, dated May 2002, which reviewed the lieutenant
5 governor's spending records from mid-January 1999 to January 2002, found a number of errors in
6 the lieutenant governor's accounting for official expenses. The audit report found that the state had
7 improperly paid approximately \$1,200 in disbursements related to political activities, including, in
8 addition to the telephone and video expenses described above, "mileage reimbursement for travel to
9 political events," but contained no further description. Attachment 1 at 8. In correspondence dated
10 May 1, 2002, the same month that the state auditor's report was released, the state attorney general's
11 office responded to the Complaint on behalf of the State of Colorado. The state attorney general's
12 office stated that there are internal procedures for reviewing the submission of receipts for
13 expenditures made by the lieutenant governor's office and that "nothing on the face of the receipts
14 would indicate that the reimbursement requests were for anything other than reimbursement of
15 [expenses] related to the function of the Office of the Lieutenant Governor." State Response at 3.
16 The state provided voluminous documents of disbursements made by the lieutenant governor's
17 office, covering the period from prior to Rogers' pursuit of federal office to the time the Complaint
18 was filed.¹⁰ After examining these documents, we were unable to find apparent evidence of federal

⁹ Based on the corrected invoice, it appears that the State of Colorado was reimbursed by the Committee. Committee Response at Exhibit H. Disbursements aggregating less than \$200 in an election cycle need not be reported as itemized disbursements. 2 U.S.C. § 434(b)(5)(A). The \$90 disbursement did not appear on the Committee's reports, and the Committee was not required to disclose it.

¹⁰ These documents include copies of receipts, invoices, state invoice and reimbursement forms, including reimbursement forms for travel such as mileage forms, rental car invoices, airline tickets, computerized printouts of payments, cellular phone bills, etc. They appear to cover the period from March 1999 to March 2002. Many of these documents are described in the state auditor's report, such as receipts for flowers, cell phone bills, invoices for candy, etc.

campaign expenditures.

Accordingly, this Office recommends the Commission find no reason to believe that the State of Colorado violated 2 U.S.C. § 441a(a). This Office further recommends the Commission find no reason to believe that Joe Rogers and Friends of Joe Rogers Exploratory Committee, now known as Friends of Joe Rogers, and Angela Wilhite, as treasurer, violated 2 U.S.C. § 441a(f), as it pertains to the use of state funds.

III. RECOMMENDATIONS

1. Find reason to believe Joe Rogers violated 2 U.S.C. § 432(e)(1), admonish Joe Rogers, and take no further action as to this respondent.
2. Find reason to believe that Friends of Joe Rogers Exploratory Committee, now known as Friends of Joe Rogers, and Angela Wilhite, as treasurer, violated 2 U.S.C. § 433(a), admonish Friends of Joe Rogers Exploratory Committee, now known as Friends of Joe Rogers, and Angela Wilhite, as treasurer, and take no further action as to these respondents.
3. Find no reason to believe that Wells Fargo Corporation violated 2 U.S.C. § 441b(a).
4. Find no reason to believe that Joe Rogers violated 2 U.S.C. § 441a(f).
5. Find no reason to believe that Friends of Joe Rogers Exploratory Committee, now known as Friends of Joe Rogers, and Angela Wilhite, as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f).
6. Find no reason to believe that the State of Colorado violated 2 U.S.C. § 441a(a).
7. Approve the appropriate letters.
8. Close the file.

Lawrence H. Norton
General Counsel

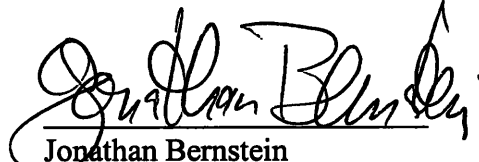
Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

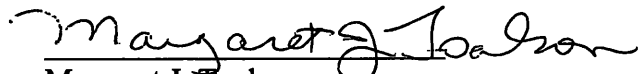
Lawrence L. Calvert, Jr
Deputy Associate General
Counsel for Enforcement

2/24/04

Date

BY:


Jonathan Bernstein
Assistant General Counsel


Margaret J. Toalson
Attorney

Other staff assigned:

Mary Beth deBeau

Attachments:

1. State Auditor's Report on the Lieutenant Governor's Office



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *fr*

DATE: February 24, 2004

SUBJECT: MUR 5251 First General Counsel Report

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

Open Session _____

Closed Session _____

CIRCULATIONS

DISTRIBUTION

SENSITIVE

☒

NON-SENSITIVE

☐

COMPLIANCE

☒

72 Hour TALLY VOTE

☒

Open/Closed Letters

☐

MUR

☐

24 Hour TALLY VOTE ☐

DSP

☐

24 Hour NO OBJECTION

☐

STATUS SHEETS

☐

Enforcement

☐

INFORMATION

☐

Litigation

☐

PFESP

☐

96 Hour TALLY VOTE

☐

RATING SHEETS

☐

AUDIT MATTERS

☐

LITIGATION

☐

ADVISORY OPINIONS

☐

REGULATIONS

☐

OTHER

☐

24-04-407-2241