

BEFORE THE FEDERAL ELECTION COMMISSION

COMMISSION  
SECRETARIAT

2006 FEB 16 A 11: 15

In the Matter of )  
Dario Herrera and Herrera for Congress )  
Congress and Michael W. Kern, in his )  
official capacity as treasurer )

MUR 5305

**SENSITIVE**

GENERAL COUNSEL'S REPORT #5

**I. ACTIONS RECOMMENDED**

Take no further action with respect to Dario Herrera and Herrera for Congress and Michael W. Kern, in his official capacity as treasurer, and close the file.

**II. BACKGROUND**

This matter involves a contribution reimbursement scheme conducted by James Rhodes resulting in contributions totaling \$37,000 to Herrera for Congress ("Herrera Committee") and Friends for Harry Reid in the names of 12 employees of Rhodes Design and Development Corp. ("RDDC") and two of their spouses.<sup>1</sup> On the basis of information suggesting that Dario Herrera knew that the Rhodes contributions were reimbursed, the Commission found reason to believe that Herrera and the Herrera Committee knowingly and willfully violated 2 U.S.C. §§ 434(b), 441b(a) and 441a(f)

<sup>1</sup> On September 20, 2005, the Commission accepted signed conciliation agreements with James M. Rhodes, RDDC, Bravo, Inc./dba Rhodes Framing, Rhodes General Partnership, James Bevan and Nadine Giudicessi, and closed the file as to them and 12 conduit contributors.

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As outlined below, because we did not uncover persuasive evidence that Herrera knew of or was involved in Rhodes's reimbursement scheme, this Office recommends that the Commission take no further action with respect to Herrera and the Herrera Committee and close the file.

**III. DISCUSSION**

We deposed Rhodes on November 7, 2005. In summary, Rhodes did not provide us with any affirmative information linking Herrera to the reimbursement scheme. Although Rhodes was a less than credible witness because he attempted to shift the blame for the initiation and control of the scheme to his subordinates James Bevan and Nadine Giudicess, his testimony was consistent in distancing Herrera from the activity. Rhodes testified that while Herrera likely requested that he raise money for Herrera's congressional campaign, he did not recall that Herrera either suggested that he approach Rhodes company employees for contributions or that he reimburse those contributions. Further, Rhodes stated that he did not discuss the reimbursement scheme with Herrera or anyone on his campaign. In an effort to test Rhodes' credibility, we interviewed former RDDC Chief Financial Officer Bevan and Bob Campbell, a lobbyist who apparently introduced Rhodes to Herrera and represented Rhodes before the Clark County Commission. Neither Bevan nor Campbell directly contradicted Rhodes's testimony. Bevan, who participated in the reimbursement scheme at Rhodes's request, stated that he never saw or heard anything indicating that Herrera knew of

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1 or participated in the reimbursement scheme. Campbell, who stopped working for Rhodes at  
2 some point in 2001, had no direct knowledge regarding Rhodes's dealings with the Herrera  
3 Committee.

4 After taking these investigative steps, we decided not to depose Herrera. We thought  
5 it doubtful that Herrera's testimony would prove worthwhile because he would likely testify  
6 in conformance with the affidavit he had submitted denying involvement in the activity,  
7 Attachment 1, or he would assert the Fifth Amendment with respect to virtually all questions.

8 When a party asserts the Fifth Amendment in a civil matter and refuses to testify in  
9 response to probative evidence offered against them, an adverse inference may be taken  
10 against that individual. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). However, liability  
11 under the Act cannot be based solely on an adverse inference, but instead requires  
12 independent corroborative evidence. See Statement of Reasons in MURs 4530, 4531, and  
13 4547 (John Huang, issued Aug. 7, 2002); *United States v. Private Sanitation Industry Ass'n*,  
14 899 F. Supp. 974, 982 (E.D.N.Y. 1994) ("[L]iability should not be imposed based solely upon  
15 the adverse inference. The government must produce 'independent corroborative evidence of  
16 the matters to be inferred' before liability will be imposed.") (citations omitted.) In the instant  
17 matter, if Herrera asserted the Fifth Amendment we could not establish liability through use  
18 of an adverse inference because we do not have independent corroborative evidence that  
19 Herrera knew of or participated in Rhodes's reimbursement scheme.

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Therefore, because the inferences supporting the reason to believe finding with respect to respondents are not buttressed by persuasive evidence of Herrera's involvement in the subject activity, this Office recommends that the Commission take no further action with respect to Dario Herrera and Herrera for Congress and close the file.

**IV. RECOMMENDATIONS**

1. Take no further action with respect to Dario Herrera and Herrera for Congress and Michael W. Kern, in his official capacity as treasurer.
2. Close the file.
3. Approve the appropriate letters.

Lawrence H. Norton  
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Date

2/15/06

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