

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

2005 FEB 25 P 12: 42

FIRST GENERAL COUNSEL'S REPORT

MUR: 5509
DATE COMPLAINT FILED: August 6, 2004
DATE OF NOTIFICATION: August 13, 2004
DATE ACTIVATED: September 28, 2004

STATUTE OF LIMITATIONS: April 5, 2009

SOURCE: COMPLAINT GENERATED

COMPLAINANT: Lenora B. Fulani, President of the Committee for a Unified Independent Party

RESPONDENTS: Kerry-Edwards 2004, Inc. and Robert Farmer, in his official capacity as treasurer, 2004 Democratic National Convention Committee, Inc. and Andrew Tobias, in his official capacity as treasurer, Democratic National Committee, and Andrew Tobias, in his official capacity as treasurer.

RELEVANT STATUTES AND REGULATIONS: 2 U.S.C. § 431(8)(B)(i)
26 U.S.C. § 9002(11)
26 U.S.C. § 9007(b)(4)
26 U.S.C. § 9008(c)
26 U.S.C. § 9008(h)
26 U.S.C. § 9032(9)

11 C.F.R. § 100.74
11 C.F.R. § 9008.3(a)(2)
11 C.F.R. § 9008.7(a)
11 C.F.R. § 9008.7(b)(1)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

25044111450

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40

1 **I. INTRODUCTION**

2 This matter concerns allegations that two publicly financed political committees
3 improperly used their public funds to keep Ralph Nader, an independent candidate for the office
4 of President, off the ballot. The complaint alleges that Kerry-Edwards 2004, Inc. ("Kerry-
5 Edwards"), the publicly financed authorized committee of presidential general election
6 candidates John Kerry and John Edwards, incurred non-qualified campaign expenses through
7 their anti-Nader efforts, and that similarly, the 2004 Democratic National Convention
8 Committee, Inc. ("Convention Committee"), the publicly financed committee established for the
9 2004 Democratic National Convention, impermissibly used convention funds for this effort.¹
10 These improper uses of public funds, it is alleged, resulted in violations of the Presidential
11 Election Campaign Fund Act ("Fund Act") and Commission regulations, as well as various
12 purported civil rights violations that are not within the Commission's jurisdiction.

13 As an initial matter, the allegations presented here are speculative and insufficiently
14 specific to justify an investigation. Secondly, it appears that much, if not all of the events being
15 described might be exempt volunteer activity. Third, as a matter of law, it appears that a
16 campaign's expenditures to challenge ballot access of an opponent may be a qualified campaign
17

¹ The Convention Committee was established by the Democratic National Committee ("the DNC") for the purpose of conducting the operations of the party's presidential nominating convention. See 11 C.F.R. § 9008.3(a)(2). The Convention Committee registers separately with the Commission, but the DNC is ultimately responsible for any repayments arising from the operations. 26 U.S.C. § 9008(h). Because of this interrelationship, the Commission notified both the Convention Committee and the DNC of the complaint.

25044111451

1 expense.² For these reasons, this Office recommends that the Commission find no reason to
2 believe that the Respondents violated the Federal Election Campaign Act or the Fund Act.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. Background**

5 The complaint sets forth two "legal claims" for which it seeks relief. First, it asserts that
6 the respondents have violated the "civil rights statutes" by discouraging Nader voters, and
7 secondly it asserts that the Fund Act was violated through the allegedly impermissible
8 expenditures.

9 The complainants cite to newspaper articles which report that various individuals,
10 including former Congressman Toby Moffett, a Democrat from Connecticut, are coordinating an
11 effort by "Democratic Party lawyers" at the "national level" to challenge Nader ballot petitions in
12 various states. This effort reportedly included activities at the 2004 Democratic National
13 Convention in Boston, where Moffett and others allegedly engaged in the recruitment and
14 training of lawyers for their ballot challenge activities. The complaint cites to other newspaper
15 articles that describe efforts in various states by Democratic Party activists or by state Democratic
16 Party officials to challenge Nader petitions.

17 The complaint provides no information as to the cost of these efforts and fails to allege
18 who, if anyone, paid for these efforts, and instead infers that because some activity apparently
19 occurred at the convention, the Convention Committee must have incurred expenses related to

² Even if the expenditures were deemed non-qualified and in violation of the Fund Act, it appears that the amounts involved may be de minimis. If the specific expenses were deemed non-qualified, the issue could be addressed when more information is available in the repayment context following audits of Kerry-Edwards and the Convention Committee.

25044111452

1 the program. The complaint presents no information which is inconsistent with these efforts
2 having been undertaken on a voluntary basis. No evidence is cited linking Kerry-Edwards to the
3 ballot challenges, but the complaint seems to assume that because Kerry-Edwards would possibly
4 benefit from Nader's absence from the ballot, Kerry-Edwards must have been involved in
5 funding the challenges.³ The complaint concedes that DNC Chairman Terry McAuliffe
6 reportedly denied that his organization was funding the anti-Nader activities.

7 The responses to the complaint focus on the insufficiency of evidence for the allegations,
8 claiming that there is no evidence of a link between the committees and the petition challenges.
9 The DNC and the Convention Committee filed a joint response in which they note that "the
10 Complaint does not state any fact at all that suggests where, when or how any Nader-related
11 activity took place" at the convention. Response at 2. Kerry-Edwards' response, in addition to
12 challenging the factual sufficiency of the complaint, also argues that, even if it was true that
13 Kerry-Edwards was funding the challenges, these expenditures meet the criteria for qualified
14 campaign expenses.

15 **B. Potential Fund Act Violations**

16 The complaint sets forth a number of unsubstantiated facts that constitute speculation.
17 The Commission may find "reason to believe" a violation of the Act has occurred when the
18

³ A month after submitting the complaint, the complainant submitted a letter to the Commission supplementing the complaint with a Bangor Daily News article alleging "that the Democratic National Committee was footing the legal bills ... to bump Nader from the ballot" in Maine. The article quoted Chair of the Maine Democratic Party Dorothy Melanson as simply stating that "they said they would help in many ways." Acknowledging ambiguity, the complainant claimed to be "endeavoring to obtain" Ms. Melanson's "actual testimony." But such "testimony" was never submitted by the complainant. At the time of the supplemental notification, the DNC and the Convention Committee had already replied to the initial complaint, and they did not reply to the supplement. Kerry-Edwards' reply post-dated the supplement, but it did not specifically address the supplement.

25044111453

1 “complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation
2 of the FECA [Federal Election Campaign Act, as amended].” Statement of Reasons in MUR
3 4960 (Hillary Rodham Clinton Exploratory Committee). A complaint is required to advance a
4 “sufficiently specific allegation,” based upon the Complainant’s personal knowledge or point to
5 additional information from outside sources that would provide some evidence to “warrant a
6 focused investigation that can prove or disprove the charge.” *Id.*

7 In this case, the complaint sets forth general information concerning the purported efforts
8 of Mr. Moffett, but has presented no evidence that the Kerry-Edwards '04 or the Convention
9 Committee had any connection to Moffett. Although Mr. Moffett was apparently present at the
10 convention and may have discussed his anti-Nader efforts with fellow attendees, there is no
11 evidence that the Convention Committee sponsored his efforts in any way. For instance, it is not
12 alleged that Moffett spoke at the convention or that he was provided with a space from which to
13 conduct any anti-Nader activity.

14 Not only does the complaint fail to advance a “sufficiently specific allegation” of a
15 violation of the Act sufficient to warrant a factual investigation and a legal analysis, the other
16 facts upon which it does rely are also insufficient bases on which to open an investigation. The
17 type of activity that is alleged to have occurred, the scrutinizing and challenging of Nader ballot
18 petitions, or the provision of expertise on the process, constitutes activity which could have been
19 volunteered. The value of services provided without compensation by any individual who
20 volunteers on behalf of a candidate or political committee is not a contribution. 2 U.S.C.
21 § 431(8)(A)(i); 11 C.F.R. § 100.74. Thus, the respondents may not have received any
22 contributions or incurred any expenditures associated with the ballot challenge activity.

25044111454

1 With respect to Kerry-Edwards, even if it incurred expenditures in a ballot challenge
2 effort, there exists no reason to believe that the facts the Complainant alleges would constitute a
3 violation of the Act even if they were proven true because it is likely that the costs are a qualified
4 campaign expenses. Presidential candidates may only use their public funding for qualified
5 campaign expenses, which are incurred to “further” the election of candidate or made “in
6 connection” with his or her campaign for nomination. 26 U.S.C. §§ 9002(11) and 9032(9).
7 Although the Commission has not considered whether an expense made in an effort to *deny*
8 ballot access to an opponent is a qualified campaign expense, it has concluded on numerous
9 occasions that efforts to *attain* ballot access are qualified campaign expenses. *See, e.g.*, AO
10 1995-45 (Hagelin for President), AO 1984-11 (Independents for Dennis Serrette). Perhaps more
11 on point, the Commission has concluded that a congressional candidate’s efforts to deny ballot
12 access to an opponent are “undertaken for the purpose of influencing an election” and that “a
13 candidate’s attempt to force an election opponent off the ballot so that the electorate does not
14 have an opportunity to vote for that opponent is as much an effort to influence an election as is a
15 campaign advertisement derogating that opponent.” AO 1980-57 (Henry Gonzalez).⁴ Taken
16 together, these advisory opinions suggest that efforts to deny ballot access to Nader may be
17 viewed as qualified campaign expenses for which public funds can be utilized.⁵ Therefore, this
18 Office recommends that the Commission find no reason to believe that Kerry-Edwards violated

⁴ The Gonzalez AO did not consider whether the expenditures would be “qualified campaign expenses” since the requester was a House candidate, not a publicly financed presidential candidate. The specific issue presented in the Gonzalez AO was whether the Bexar County Democratic Party could raise funds to finance Gonzalez’s legal efforts to challenge his election opponent’s ballot petitions. The Commission concluded that any funds raised by the party committee would be considered contributions to Gonzalez.

⁵ The complaint acknowledges that the FECA and Fund Act do not specifically address the permissibility of funding petition challenges, but cites to a New York City Campaign Finance Program rule which prohibits the use of public funds for ballot challenges.

25044111455

1 any provision of the Federal Election Campaign Act of 1971, as amended, or the Presidential
2 Election Campaign Fund Act.⁶

3 The permissibility of the Convention Committee's alleged expenditures for ballot access
4 activities requires an examination of the convention funding statutes and regulations.
5 Convention committees are required to use their grant of public funds only to defray expenses
6 incurred with respect to the convention. 26 U.S.C. § 9008(c). These expenses may include costs,
7 related to the physical site, security, utilities, decorations, salaries of convention committee
8 employees, and administrative costs. 11 C.F.R. § 9008.7(a). However, convention committees
9 are prohibited from using their funds to defray expenses of any candidate. 26 U.S.C. § 9008(c);
10 11 C.F.R. § 9008.7(b)(1). Ballot access costs of candidates, it has been concluded, relate to the
11 campaign of an individual, not to the conduct or organizing of a convention, and therefore cannot
12 be paid with convention funds. *See* AO 2000-6 (2000 Convention Committee of Reform Party
13 USA).⁷ Nevertheless, given the lack of specificity of the complaint, this Office recommends that
14 the Commission find no reason to believe a violation occurred with respect to the Convention
15 Committee. While the complaint describes some activity that allegedly occurred at the
16 convention which related to the Nader petition challenges, it is not apparent that this activity was
17 an official part of the convention proceedings or that any funds were disbursed for the activity. If
18 the activity was part of the program, it may be difficult to prorate its cost from the overall cost of
19 the convention, or the cost may be a de minimis amount. Therefore, this Office recommends that

⁶ The Commission's audit of Kerry-Edwards will examine the committee's expenditures for compliance with the Fund Act, and if any evidence indicates that the committee incurred non-qualified campaign expenses, a repayment could be sought. 26 U.S.C. § 9007(b)(4).

⁷ In this AO, the Reform Party sought to use part of its public grant of convention funds to assist candidates in achieving ballot access. The Commission concluded that ballot access costs were a candidate's obligation and that the convention committee could not incur these expenditures.

25044111456

1 the Commission find no reason to believe that the Convention Committee violated any provision
2 of the Federal Election Campaign Act of 1971, as amended, or the Presidential Election
3 Campaign Fund Act.⁸ Consistent with the recommendations for the Convention Committee, this
4 Office also recommends that the Commission find no reason to believe the Democratic National
5 Committee violated any provisions of Federal Election Campaign Act of 1971, as amended, or
6 the Presidential Election Campaign Fund Act.⁹

7 **C. Other Potential Violations of Law**

8 As previously noted the complaint pursued a second legal claim concerning the
9 possibility of civil rights violations. Insofar as the Commission has no jurisdiction in this area,
10 no findings are warranted. Moreover, the civil rights allegations flow from the alleged
11 coordinated efforts of Mr. Moffett and the two publicly-financed committees; but given the
12 speculative nature of this allegation, there is also no reason to consider a referral or report to a
13 different government agency that may have jurisdiction over civil rights violations.

14

⁸ Given that the Commission is conducting an audit of the finances of the Convention Committee, any expenditure found to be impermissible can be addressed in the repayment context. 26 U.S.C. § 9008(h).

⁹ Although the complaint supplement suggested the Commission "pursue a lead" based on a newspaper article in Maine, which concluded that the DNC was involved in anti-Nader efforts, the article itself was vague and did not clearly establish the DNC's role in any anti-Nader activities in Maine. While it is possible that Mr. Moffett may have made a contribution to Kerry-Edwards, the complaint does not allege this possibility and there is no evidence of coordination between Mr. Moffett and Kerry-Edwards '04 or the DNC to suggest that an investigation is warranted. A similar conclusion should be reached with respect to United Progressives for Victory ("UPV"), a section 527 organization founded by Mr. Moffett, but not identified in the complaint, which was devoted to keeping Nader off state ballots. UPV's associated political committee, sharing the same name, is registered with the Commission and was funded primarily with contributions from PACs of major labor organizations, but received no contributions from any PACs affiliated with political parties or candidates. Moreover, many of the activities that may have been in some way sponsored by UPV or the DNC may constitute "volunteer" efforts excluded from the definition of contribution. 2 U.S.C. § 431(8)(B)(i).

25044111457

1 **III. RECOMMENDATIONS**

- 2 1. Find no reason to believe that Kerry-Edwards 2004, Inc., and Robert Farmer, in his
3 official capacity as treasurer, violated the Federal Election Campaign Act of 1971, as
4 amended, or the Presidential Election Campaign Fund Act.
5
6 2. Find no reason to believe that the 2004 Democratic National Convention Committee,
7 Inc., and Andrew Tobias, in his official capacity as treasurer, violated the Federal
8 Election Campaign Act of 1971, as amended, or the Presidential Election Campaign Fund
9 Act.
10
11 3. Find no reason to believe that the Democratic National Committee, and Andrew Tobias,
12 in his official capacity as treasurer, violated the Federal Election Campaign Act of 1971,
13 as amended, or the Presidential Election Campaign Fund Act.
14
15 4. Approve the appropriate letters.
16
17 5. Close the file.

18
19
20 Lawrence H. Norton
21 General Counsel
22

23 2/24/05
24 Date

25 BY: Rhonda J. Vosdingh
26 Rhonda J. Vosdingh
27 Associate General Counsel for Enforcement

28 Mark D. Shonkwiler
29 Mark D. Shonkwiler
30 Assistant General Counsel

31
32 Peter G. Blumberg
33 Peter G. Blumberg
34 Attorney
35

2504411458