

JAN 20 2006

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5518

DATE COMPLAINT FILED: August 23, 2004

DATE OF NOTIFICATION: August 27, 2004

LAST RESPONSE RECEIVED: September 15, 2005

DATE ACTIVATED: July 19, 2005

EXPIRATION OF SOL: February 20, 2009

COMPLAINANT:

Doug Fairhurst
Treasurer, Hawaii Republican Party

RESPONDENTS:

Democratic Party of Hawaii and
Yuriko Sugimura, in her official capacity as treasurer

**RELEVANT STATUTES:
AND REGULATIONS:**

2 U.S.C. § 441b
2 U.S.C. § 434(b)
2 U.S.C. § 441d
2 U.S.C. § 441i(e)
11 C.F.R. § 100.16
11 C.F.R. § 100.17
11 C.F.R. § 100.22(a)
11 C.F.R. § 100.24
11 C.F.R. § 100.26
11 C.F.R. § 100.27
11 C.F.R. § 104.3(b)
11 C.F.R. § 104.4
11 C.F.R. § 110.11
11 C.F.R. § 300.61
11 C.F.R. § 300.62
11 C.F.R. § 300.64

**INTERNAL REPORTS
CHECKED:**

Disclosure reports; Commission indices

**FEDERAL/STATE AGENCIES:
CHECKED**

Hawaii Campaign Spending Commission

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I. INTRODUCTION

The Democratic Party of Hawaii ("DPH") conducted statewide precinct meetings on February 24, 2004. Two weeks before the precinct meetings, the DPH sent a letter inviting the DPH members to the meetings and informing them of activities planned for the meetings. Subsequently, the DPH held a fundraiser on April 15, 2004, in honor of Senators Daniel K. Inouye and Daniel K. Akaka. Complainant alleges that the precinct meetings and fundraiser qualify as "federal election activity" ("FEA") and that the DPH used prohibited funds to engage in FEA and failed to properly and timely report receipts and disbursements for FEA.

The DPH contends that the activities at issue did not meet the definition of FEA under 2 U.S.C. § 431(20)(A) because the precinct meetings fell outside the 120-day period before the date of a regularly scheduled federal election in Hawaii and because the April 2004 fundraiser involved only non-Federal activity.

As further discussed below, the precinct meetings are not FEA and the DPH letter is better analyzed as an independent expenditure. The DPH misreported the disbursements for the letter as allocable expenses rather than as independent expenditures, financed the letter using impermissible funds, and failed to include a disclaimer on its letter. The DPH may also have received Federal contributions in response to a solicitation in the letter. Finally, the available information does not support the allegations about the April 2004 fundraiser. For these reasons, we recommend that the Commission find reason to believe that the DPH violated 2 U.S.C. §§ 434(b), 441b and 441d.

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II. FACTUAL AND LEGAL ANALYSIS

A. The DPH Letter and February 24, 2004, Precinct Meetings

1. Facts

At its precinct meetings on February 24, 2004, the DPH conducted a presidential preference poll to determine which of the presidential primary candidates the DPH delegates would represent at the 2004 Democratic National Convention. Response at 1-2. The DPH also made available voter registration and party enrollment forms. *Id.* On February 9, 2004, the DPH sent a letter inviting its members to the meetings and also to bring others along, describing the activities that would take place there and soliciting donations. Complaint at 6. The letter also stated: "This is your opportunity to join and support your fellow Democrats nationwide, by helping to select our candidate to take back our country from George W. Bush in November." *Id.* The DPH reported \$2,571.72 in disbursements for the letter on its 2004 April Quarterly Report, allocating these disbursements between its Federal and non-Federal accounts on Schedule H4 (Disbursement for shared Federal/non-Federal Activity Schedule).¹ The DPH states it incurred no cost by including voter registration forms in the packets provided to counties for use in the February 24, 2004, precinct meetings. Response at 2.

Date	Purpose/Description	Non-Federal		
		Federal Share	Share	Amount
2/03/2004	Notice to Members - Pres. Pref. Poll	\$ 707.73	\$ 1,258.19	\$1,985.92
2/13/2004	Return Postage-Pres. Pref. Poll Notice	\$ 58.08	\$ 103.26	\$ 181.34
3/01/2004	Return Postage-Pres. Pref. Poll Notice	\$ 107.67	\$ 191.41	\$ 299.08
3/15/2004	Return Postage-Pres. Pref. Poll Notice	\$ 26.06	\$ 46.32	\$ 72.38
3/16/2004	Return Postage-Pres. Pref. Poll Notice	\$ 26.21	\$ 46.59	\$ 72.80
	Totals:	\$ 925.75	\$ 1,645.77	\$2,571.52

2. Legal Analysis

a. The Precinct Meetings and DPH Letter

Complainant frames his allegations in terms of FEA. However, the DPH's February 24, 2004, precinct meetings are by definition not FEA, *see* 2 U.S.C. § 431(20)(B)(iii) and 11 C.F.R. § 100.24 (FEA does not include the costs of a state party's political convention, meeting or conference), and the DPH letter is more than FEA – it is express advocacy.

Express advocacy means in part “any communication that—(a) Uses phrases such as . . . “support the Democratic nominee,” . . . “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” . . . “reject the incumbent” . . . , which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)” 11 C.F.R. § 100.22(a). The statement in the letter, “This is your opportunity to join and support your fellow Democrats nationwide, by helping select our candidate to take back our country from George W. Bush in November” is express advocacy under 11 C.F.R. § 100.22(a) because it uses words which in context have no other reasonable meaning than to urge the defeat of a clearly identified candidate. Specifically, the statement urges Democrats to take action to help defeat President Bush in the 2004 general election. Moreover, this statement is functionally equivalent to the phrase “reject the incumbent” cited in 11 C.F.R. § 100.22(a).

Because there is express advocacy and there is no allegation nor does the available information suggest that the DPH coordinated the letter with any Federal candidate, the DPH's disbursements for the DPH letter were independent expenditures, *see* 2 U.S.C. § 431(17) and 11 C.F.R. § 100.16, and should have been reported as such. *See* 2 U.S.C. § 434(b)(4)(H)(iii); 11 C.F.R. §§ 104.3(b)(3)(vii) and 104.4. Instead, the DPH misreported the disbursements for the letter as allocable expenses on Schedule H4 (Disbursement for shared Federal/non-Federal

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Activity Schedule). Based on the above, we recommend that the Commission find reason to believe that the Democratic Party of Hawaii and Yuriko Sugimura, in her official capacity as treasurer, violated 2 U.S.C. § 434(b).

b. The DPH Financed the Letter Using Impermissible Funds

The DPH used \$1,645.77 from a non-Federal account to pay for the letter.² *See supra* note 1. During the six-month period before and during the activity at issue, September 2003 through March 2004, the DPH's non-Federal account reported receiving \$21,150 in contributions appearing to be from corporate and union sources.³ *See* Hawaii Rev. Stat. § 11-204(a)-(k) (Hawaii law allows corporate and union contributions). Thus, the DPH apparently financed the letter using impermissible funds.⁴ 2 U.S.C. § 441b. Based on the above, this Office recommends that the Commission find reason to believe that the Democratic Party of Hawaii and Yuriko Sugimura, in her official capacity as treasurer, violated 2 U.S.C. § 441b.

c. The DPH May Have Received Federal Contributions

If a solicitation indicates that the funds will be used "for the purpose of influencing a Federal election," any funds received in response are contributions under the Federal Election

² DPH disclosure reports filed with the State of Hawaii Campaign Spending Commission reflect that the DPH's non-Federal account consists of four non-Federal committees: the Democratic Party of Hawaii, Oahu County Committee; the Maui County Democratic Party; the Democratic Party County of Hawaii; and the Kauai Democratic County Committee.

³ Several other contributions received during that same period also may come from corporate sources, *e.g.*, contributions from limited liability companies and professional organizations/groups.

⁴ It does not matter whether the DPH would have had sufficient federal funds in its non-Federal committees to pay the costs of the letter. Commission regulations allow, under certain circumstances, a State, district or local party committee to demonstrate "through a reasonable accounting method" that it would have had sufficient permissible funds to make a payment. *See* 11 C.F.R. §§ 102.5(a)(3)(ii) and 300.32(b)(1). The "reasonable accounting method" applies where the committee spends Levin funds for certain FEA activities. *Id.* This method is not available to the DPH here because the DPH letter refers to a clearly identified candidate and Levin funds may not be used for FEA that refers to a clearly identified candidate. *See* 11 C.F.R. § 300.32(c)(1).

1 Campaign Act of 1971, as amended ("the Act").⁵ See 2 U.S.C. § 431(8)(A); see also *FEC v.*
2 *Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). In *Survival Education Fund*, the
3 court found that a July 1984 letter from two nonprofit issue advocacy groups solicited
4 "contributions" under the Act because the letter included the statement: "your special election-
5 year contribution today will help us communicate your views to hundreds of thousands of
6 members of the *voting public*, letting them know why Ronald Reagan and his anti-people
7 policies *must* be stopped." *Id.* at 289 and 295 (first emphasis added by court, second in original).
8 The court found that the statement "leaves no doubt that the funds contributed would be used to
9 advocate President Reagan's defeat at the polls, not simply to criticize his policies during the
10 election year." *Id.* at 295.

11 Similarly, the DPH letter includes a solicitation for donations and language indicating
12 that donations will be used to oppose a Federal candidate. The letter states the following:

13 The Democratic Party of Hawai'i needs your help. For the first
14 time in many years, we are asking our members to provide us with
15 much-needed financial support. Party volunteers have worked
16 diligently to plan our upcoming events, such as our February 24
17 presidential preference poll and our May 28-30 state convention . .
18 . . Your timely support will help us . . . deliver our White House
19 and Congress from the corrosive influence of special corporate
20 interests. . . . This is your opportunity to join and support your
21 fellow Democrats nationwide, by helping to select our candidate to
22 take back our country from George W. Bush in November.
23

24 Complaint at 6. The above language communicates to recipients that funds received will be used
25 oppose the election of President Bush. As a result, funds received in response to these
26 solicitations would constitute "contributions" under the Act and would have to be reported as
27 such. See *Survival Education Fund*, 65 F.3d at 285; 2 U.S.C. § 434(b).

⁵ A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A).

1 The DPH non-Federal account may have received contributions in response to this
2 solicitation. Within several weeks of its mailing, the Democratic Party of Hawaii, Oahu County
3 Committee, received 17 contributions totaling \$42,700.⁶ At least four of those contributions,
4 totaling \$20,150, appear to have come from sources that would be prohibited under the Act, *i.e.*,
5 corporations and unions. If the DPH received any such contributions in response to the letter, the
6 DPH accepted prohibited contributions and failed to report such contributions. *See* 2 U.S.C.
7 §§ 441b and 434(b). Based on the above, this Office recommends that the Commission find
8 reason to believe that the Democratic Party of Hawaii and Yuriko Sugimura, in her official
9 capacity as treasurer, violated 2 U.S.C. §§ 441b and 434(b) in connection with this solicitation.

10 **d. The DPH Failed to Include a Disclaimer on the Letter**

11 The DPH letter was a "public communication" for which the DPH made disbursements
12 and which also contained express advocacy and a solicitation for contributions.⁷ Therefore, the
13 letter should have contained a disclaimer listing the DPH's permanent street address, telephone
14 number or web site address, a statement that it paid for the communication and also that the
15 communication was not authorized by any candidate or candidate's committee. 2 U.S.C. § 441d;
16 11 C.F.R. §§ 110.11(a)(1)-(3), (b). The copy of the letter attached to the complaint, however,
17 does not show any of the required information and disclaimer notice. Therefore, this Office
18 recommends that the Commission find reason to believe that the Democratic Party of Hawaii and
19

⁶ The total includes contributions in February and March 2004. We have excluded contributions received in April 2004 because the DPH held a fundraiser on April 15, 2004, and contributions received in April may have been made in connection with this fundraiser.

⁷ The DPH letter meets the definition of a "public communication" because it is a "mass mailing." 2 U.S.C. §§ 431(22) (a public communication includes a "mass mailing") and 431(23) (a "mass mailing" means a mailing of more than 500 pieces of mail); 11 C.F.R. §§ 100.26 and 100.27. Disclosure reports reflect that the DPH spent \$625.60 for return postage for the presidential preference poll notice. *See supra* note 1. Assuming the return postage for each letter cost 37 cents or less, the DPH likely mailed letters to at least 1,690 persons (\$625.60 divided by .37).

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Yuriko Sugimura, in her official capacity as treasurer, violated 2 U.S.C. § 441d.

B. The Democratic Party of Hawaii April 15, 2004, Fundraiser

The DPH held a fundraiser on April 15, 2004, in honor of Senators Daniel K. Inouye and Daniel K. Akaka. Complaint at 5. The fundraiser invitation attached to the complaint: a) states, "Hawaii House Democrats Honor Senator Daniel K. Inouye and Senator Daniel K. Akaka"; b) seeks "sponsors" to make donations to the DPH at levels from \$250 to \$10,000; and c) provides a contribution form. *Id.* Complainant alleges that the DPH deposited funds raised at the fundraiser into a Federal account to conduct FEA and failed to properly report the FEA. *Id.* at 2.

In response, the DPH states that the fundraiser was non-Federal activity so that all disbursements for the event were paid out of the DPH's non-Federal account, all funds raised at the event were deposited into the non-Federal account and the Senators did not solicit or receive any funds at the fundraiser. Response at 2-3. Disclosure reports filed with the Hawaii Campaign Spending Commission reflect non-Federal receipts to and disbursements from the DPH for this event.

Complainant provides no basis to support his allegations that the fundraiser was used as a vehicle to raise Federal funds to conduct FEA.⁸ On the contrary, the available information indicates that the fundraiser was non-Federal activity and that receipts and disbursements related to the event were handled through the non-Federal account. Moreover, the DPH asserts that neither guest solicited nor raised funds at the event. In any event, Senator Akaka and Senator Inouye may participate as featured guests at the event because the Act expressly permits such

⁸ Federal candidates/officeholders may not raise funds for Federal elections, including funds for FEA, outside the limits, prohibitions and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A); 11 C.F.R. §§ 300.60 and 300.61.

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participation at state party fundraising events. 2 U.S.C. § 441i(e)(3); 11 C.F.R. § 300.64.⁹

III. PROPOSED INVESTIGATION

The informal investigation will principally focus on whether the DPH received contributions in response to the letter. _____

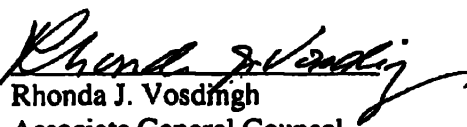
IV. RECOMMENDATIONS

1. Find reason to believe that the Democratic Party of Hawaii and Yuriko Sugimura, in her official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441b and 441d.
2. Approve the attached Factual and Legal Analysis.
3. _____
4. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

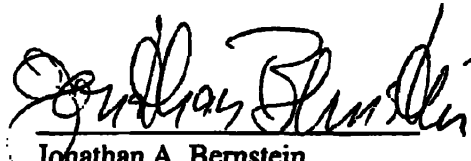
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Date

BY:


Rhonda J. Vosdigh
Associate General Counsel
for Enforcement

⁹ Ordinarily, Federal candidates/officeholders are prohibited from raising funds for non-Federal elections beyond the limits/prohibitions of the Act. 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. §§ 300.60 and 300.62. Under the section 441i(e)(3) exception discussed above however, they may attend, speak without restriction at, or be the featured guest at a state party committee fundraiser. See also 11 C.F.R. § 300.64. The cover of the invitation does present one possible issue. The cover states "Hawaii House Democrats Honor...[Sens. Inouye and Akaka], suggesting that the "Hawaii House Democrats" sponsored or hosted the event. In context this most likely refers to the members of the Hawaii state legislature rather than to Reps. Abercrombie and Case, the two Democrats representing Hawaii in the U.S. House of Representatives. On the other hand, if federal officeholders hosted this non-Federal fundraising event, there may be an issue under 2 U.S.C. § 441i(e)(3), because it may not extend to Federal officeholders who serve on "host committees" for these events. See Explanation & Justification ("E&J") for 11 C.F.R. § 300.64, 67 Fed. Reg. 672 (Jul. 29, 2002) ("Federal candidates and officeholders are prohibited from serving on "host committees" for a party fundraising event . . . on the basis that these pre-event activities are outside the permissible activities described above flowing from a Federal candidate's or officeholder's appearance or attendance at the event"). If the investigation does not confirm our initial assumption, we will make appropriate recommendations.

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Jonathan A. Bernstein
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Attorney

Attachment:
Factual and Legal Analysis

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