

11044284034

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

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2010 NOV 19 11:01
CONFIDENTIAL

FIRST GENERAL COUNSEL'S REPORT

MUR: 6330
DATE COMPLAINT FILED: July 16, 2010
DATE OF NOTIFICATION: July 21, 2010
DATE OF LAST RESPONSE: August 2, 2010
DATE ACTIVATED: August 31, 2010
EXPIRATION OF SOL: March 14, 2014

COMPLAINANT: Donald K. Allen
RESPONDENTS: Bill Johnson
Bill Johnson for Congress and
Perry J. Chickonoski,
in his official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:** 2 U.S.C. § 431(2)
2 U.S.C. § 432(e)(1)
2 U.S.C. § 433(a)
11 C.F.R. § 101.1(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

OTHER AGENCIES CHECKED: None

RECEIVED
FEDERAL ELECTION
COMMISSION
2010 NOV 19 PM 12:52
CELA

I. INTRODUCTION

The complaint in this matter alleges that Bill Johnson, who was a candidate for Representative in Ohio's 6th Congressional District, violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to timely register with the Federal Election Commission (the "Commission") as a "candidate" after raising in excess of \$5,000 in contributions. See 2 U.S.C. § 431(2). Because the allegation also implicates Johnson's authorized committee and whether it timely registered, this Office notified Johnson and his

1 authorized committee, Bill Johnson for Congress and Perry J. Chickonoski, in his official
2 capacity as treasurer, (the "Committee") of the complaint.

3 In a joint response, Respondents claim that Johnson timely filed his Statement of
4 Candidacy with the Commission on February 17, 2010, within 15 days of becoming a
5 candidate, and timely designated his principal campaign committee, as required by the Act and
6 the Commission's regulations. The response states that funds raised or spent prior to this date
7 were for "testing the waters" activities, and were therefore exempt from the \$5,000 threshold.
8 2 U.S.C. § 432(e)(1); *see also* 11 C.F.R. § 101.1(a).

9 As discussed below, based on the complaint, the response, and other available
10 information, there is no available information suggesting that Johnson, or his Committee,
11 conducted activities outside the "testing the waters" exception and became a candidate prior to
12 Johnson's February 11, 2010, declaration of candidacy. In addition, it appears that candidate
13 Bill Johnson timely filed his Statement of Candidacy within 15 days of his declaration of
14 candidacy and timely designated his principal campaign committee, and that his campaign
15 Committee filed a Statement of Organization within 10 days of Johnson's designation.
16 Therefore, we recommend that the Commission find no reason to believe that Bill Johnson
17 violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a), and no reason to believe that Bill
18 Johnson for Congress and Perry J. Chickonoski, in his official capacity as treasurer, violated 2
19 U.S.C. § 433(a), and close the file.

11044284035

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Summary**

3 During the 2009-2010 election cycle, Bill Johnson was a candidate for Representative in
4 Ohio's 6th Congressional District. The complainant, Donald K. Allen, states that in March
5 2009, he and Johnson met with Mahoning County Republican officials to seek the party's
6 support to run for Congress. Complaint at 1. According to Allen, they reached an
7 understanding at the meeting that Allen would run in the 6th District and Johnson in the 17th
8 District.¹ *Id.* The complainant further claims that when the party officials agreed at this
9 meeting to offer their support to both Allen and Johnson, Allen considered himself a candidate,
10 and he filed a Statement of Candidacy with the Commission on May 8, 2009, after he raised
11 \$5,000 in contributions. Thus, Allen believes that based on the March 2009 meeting, Johnson
12 too was required to file as a candidate with the Commission once he reached the \$5,000
13 threshold. Complaint at 2. Although the complaint does not allege when exactly such a filing
14 was due, according to disclosure reports filed with the Commission, it appears that Johnson
15 reached the \$5,000 contribution threshold on November 2, 2009, and the \$5,000 expenditure
16 threshold on December 9, 2009, making the registration due, under the complaint's
17 interpretation, on November 17, 2009. *See Johnson Committee*, 2010 April Quarterly
18 Disclosure Report. The complainant says that in January 2010, Johnson decided to run in the 6th
19 District against Allen, rather than the 17th District, "for an easier race." Complaint at 1.
20 Johnson won the Republican nomination in the May 4, 2010, primary election, and he won the
21 general election.

¹ Mahoning County, Ohio, is within Ohio's 6th and 17th Congressional Districts.

11044284036

1 The only specific violation alleged in the complaint is that Johnson failed to timely
2 register as a candidate after exceeding the relevant contribution threshold. Complaint at 2. The
3 complainant claims that although Johnson "was campaigning under an 'exploratory committee,'
4 he was actually laying the groundwork and soliciting donations for his campaign." More
5 broadly, the complaint also alleges that Johnson "has not followed FEC rules and regulations
6 during [the] campaign, and has otherwise consistently exhibited deceptive practices," including
7 that he apparently hired a fundraiser who was under contract to a competitor. *Id.* at 1 and 2.

8 Respondents generally deny the complaint's allegations, claiming that any funds raised
9 or disbursements made prior to Johnson's February 11, 2010, declaration of candidacy were for
10 "testing the waters" to determine the feasibility of a Congressional campaign. Response at 2.
11 Respondents state that Johnson began conducting exploratory activities in October 2009,
12 including polling, traveling to meet constituents, and making telephone calls to gauge "the
13 depth of possible support." *Id.* The Response does not address the March 2009 meeting and
14 does not mention any exploratory or other campaign activity that may have occurred between
15 March 2009 and October 2009. Respondents submitted several communications demonstrating
16 that its activities were exploratory, including: (1) pages from the Committee's exploratory
17 committee website, which included the statements "as I consider a run," and "many have
18 encouraged me to run for office"; (2) pledge cards that include the disclaimer "paid for by the
19 Bill Johnson for Congress Exploratory Committee"; (3) a copy of a biographical packet entitled
20 "Get to Know Bill Johnson" that was offered to potential supporters who "asked for
21 documentation," and contains an introduction that states that Johnson was "humbled and
22 honored that folks are encouraging him to run for public office"; and (4) a news article dated
23 February 2, 2010, in which Johnson is described as "a conservative Republican who is

11044284037

1 considering a run for the U.S. House from either the 17th or 6th Congressional Districts” and is
2 quoted as saying “My goal in exploring a campaign was to determine whether or not my
3 experience as a career military officer, a businessman, and someone who lives conservative
4 values could make a difference in Washington.” Response attachments.

5 Johnson ultimately declared his candidacy for Ohio’s 6th District seat on February 11,
6 2010. Response at 2. Respondents claim that at no time prior to declaring his candidacy did
7 Johnson publicly indicate that he was a candidate. Response at 3. Further, Johnson asserts that
8 on February 17, 2010, which was within 15 days of becoming a candidate, he filed his
9 Statement of Candidacy with the Commission, as required by the Act and the Commission’s
10 regulations. *Id* at 2 and 3. Respondents also state that the Committee filed its Statement of
11 Organization on the same day, and properly disclosed its “testing the waters” activity in its first
12 report filed with the Commission. *Id* at 3. In its April Quarterly report filed with the
13 Commission on April 17, 2010, and covering the period of October 1, 2009, to March 31, 2010,
14 the Committee disclosed just over \$96,000 in receipts and over \$74,000 in disbursements
15 covering the claimed “testing the waters” period.

16 **B. Legal Analysis**

17 An individual becomes a candidate for federal office – and thus triggers registration and
18 reporting requirements under the Act – when he or she has received or made in excess of \$5,000
19 in contributions or expenditures. 2 U.S.C. § 431(2). The Commission created a limited
20 exemption to the definitions of “contribution” and “expenditure” for “testing the waters”
21 activity, allowing individuals to conduct certain activities designed to evaluate a potential
22 candidacy. *See* 11 C.F.R. §§ 100.72 and 100.131; *see also* Explanation and Justification for
23 Final Rules on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9592 (Mar.

11044284038

13, 1985) ("*Testing the Waters E&J*"); Explanation and Justification to the Disclosure Regulations, House Doc. No. 95-44, Communication from the Chairman, FEC, Transmitting the Commission's Proposed Regulations Governing Federal Elections, at 40 (Jan. 12, 1977). An individual who is "testing the waters" may conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy, *see* 11 C.F.R. § 100.72(a); 11 C.F.R. §100.131(a), but need not register or file disclosure reports with the Commission unless and until the individual subsequently decides to run for Federal office or conducts activities that indicate he or she has decided to become a candidate. All funds raised and spent for "testing the waters" activities are, however, subject to the Act's limitations and prohibitions. *See id.*

Commission regulations set out five non-exhaustive factors to be considered in determining whether an individual has decided to become a candidate. An individual can indicate that he has gone beyond "testing the waters" and has decided to become a candidate by (1) using general public political advertising to publicize his intention to campaign for Federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after he becomes a candidate; (3) making or authorizing written or oral statements that refer to him as a candidate for a particular office, (4) conducting activities in close proximity to the election or over a protracted period of time; and (5) taking action to qualify for the ballot under state law. 11 C.F.R. § 100.72(b); 11 C.F.R. § 100.131(b).

Once an individual meets the \$5,000 threshold and has decided to become a candidate, he has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission. *See* 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). The principal campaign

11044284039

1 committee must then file a Statement of Organization within ten days of its designation, *see* 2
2 U.S.C. § 433(a), and must file disclosure reports with the Commission in accordance with 2
3 U.S.C. §§ 434(a) and (b).

4 The complaint states that Johnson became a candidate and was required to file his
5 Statement of Candidacy after he received \$5,000 in contributions, which occurred in November
6 2009, several months prior to Johnson's February registration. However, the Commission has
7 previously determined that exceeding the contribution threshold, or even raising a more
8 significant amount of contributions (*e.g.* \$100,000 or more), was not sufficient by itself to
9 remove a candidate and his or her activities from the "testing the waters" exemption.² Instead,
10 in determining whether an individual has gone from "testing the waters" to becoming a
11 "candidate," the Commission has considered whether the individual has engaged in activities or
12

² *See, e.g.*, MUR 6224 (Fiorina) (no reason to believe where a U.S. Senate candidate's campaign committee raised in excess of \$3.5 million in contributions during the "testing the waters" phase of a campaign); MUR 5703 (Rainville) (no reason to believe where a U.S. Representative candidate's campaign committee raised \$100,000); MUR 5661 (Butler) (no reason to believe where a U.S. Senate candidate's campaign committee raised over \$100,000); MUR 5934 (Fred Thompson) (allegations dismissed and file closed where a U.S. Presidential candidate's campaign committee raised over \$950,000); and MUR 2710 (Judge Harvey Sloane) (no reason to believe where a U.S. Senate candidate's campaign committee raised \$200,000).

11044284040

1 made statements that would indicate that he or she has decided to run for federal office.³ Once
2 an individual engages in these activities, he or she is a candidate under the Act and the "testing
3 the waters" exception is no longer available.

4 In this matter, the complainant offers no information demonstrating that Johnson had
5 made a decision to run prior to officially declaring his candidacy, or that any of Johnson's pre-
6 candidacy activities were anything but exploratory. The complaint suggests that Johnson made
7 the decision during the March 2009 meeting with Republican officials. The Respondents do not
8 address the meeting in their response, but regardless of whether Johnson agreed to become a
9 candidate at that meeting, it is not the sort of activity that evidences a candidacy pursuant to the
10 regulations. The meeting was not a public forum or public political advertisement, and there is
11 no information suggesting that Johnson publicized the results of the meeting in any manner.
12 See 11 C.F.R. § 100.72(b); 11 C.F.R. § 100.131(b). Moreover, according to the complaint,
13 Johnson asked at the meeting if the Mahoning County Republican Party officials would support
14 him to run in the 17th Congressional District. However, Johnson ultimately ran in the 6th

³ See, e.g., MUR 5363 (Sharpton) (candidate no longer "testing the waters" when he published a book including statements such as "It is on these qualities that I am seeking the Presidency of the United States in 2004"); MUR 5693 (Aronsohn) (individual became a candidate when he sent a solicitation letter that included statements such as "But I have the energy, the experience, and the determination to win this race. And as evidenced by the attached news article, I am ready to begin fighting for our future...now"; "Every dollar we receive in the next few weeks can help us prepare for this fight against Scott Garrett"; and "We have come a long way in just a few short weeks. And with your support, we can go the distance"); and MUR 5251 (Rogers) (candidate no longer "testing the waters" when he reportedly said, "I want to be your congressman and need your help to win the seat" at a fundraising event, and sent a fundraising letter that contained the statement, "I know that I will effectively serve your interests in Congress and that because of the close working relationship with the President and the leadership of Congress that I will immediately work for the benefit of Colorado").

See *contra* MUR 5661 (Butler) (complaint alleged that Butler distributed "high quality" campaign literature and announced to Republican State Convention delegates that he had raised over \$100,000 "in his campaign for U.S. Senate." The brochure distributed contained photographs of Butler with his family and other political figures, biographical information, and an excerpt from a news article that included statements by another individual that he believed Butler was in the race, no matter who else decided to run. As the brochure was consistent with his stated purpose of gauging interest in a possible run, the Commission found no reason to believe that Keith Butler or his committee violated the Act).

11044284041

District, demonstrating the preliminary nature of the meeting. Therefore, the meeting and any discussion at the meeting is not evidence of a candidacy.

Further, the Respondents claim that at no time during the "testing the waters" period did it conduct activities that would have triggered "candidate status" as defined by the Commission's regulations, and they claim that Johnson and his agents "made it clear at every opportunity that the effort was exploratory in nature." None of the communications submitted by Respondants include any statement that could be reasonably construed to imply that Johnson had declared his candidacy before February 11, 2010, and, in fact, the materials seem to state carefully that Johnson was only considering his options.

In addition to the documents submitted by Respondents, we also reviewed publicly available information such as news articles, social network sites, and website articles. We did not find any instance in which Johnson indicated that he was a candidate prior to his declared candidacy. For example, posts on the Committee's official Facebook page, created on December 17, 2009, make no mention of a candidacy or a campaign for federal office, prior to February 11, 2010. In contrast, posts made after his declaration of candidacy clearly refer to his campaign for office, and a post the day after he declared his candidacy sought signatures that would qualify Johnson for the state ballot. See <http://www.facebook.com/BillJohnsonLeads>. Also, news reports published prior to February 2010 refer to Johnson as a potential candidate, or report that he is considering a run. See, e.g., David Skolnick, *Of Valley's 5 Congress Members, Ryan has Lowest Campaign Fund*, The Valley's Homepage (February 2, 2010), <http://www.vindy.com/news/2010/feb/02/of-valleys8217-5-congress-members-ryan-h/?print> ("Bill Johnson of Poland, who's considering a run as a Republican in the 17th District, said he raised more than \$107,000 in the last three months of the year for his congressional exploratory

11044284042

committee"). Finally, there is no information to indicate that the Committee amassed campaign funds to be used after the "testing the waters" period. *See* 11 C.F.R. §§ 100.72(b)(2) and 100.131(b)(2). Johnson's disclosure reports indicate that the exploratory committee spent over \$74,000 of \$96,000 it raised during the exploratory period, so it does not appear to have raised funds for later use in the election.

There is no available information suggesting that Johnson conducted activities that would have ended the "testing the waters" period and made Johnson a candidate, as defined by the Act, prior to his February 11, 2010, declaration of candidacy. Accordingly, this Office recommends that the Commission find no reason to believe that Bill Johnson violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy with the Commission and to designate his principal campaign committee, and find no reason to believe that Bill Johnson for Congress and Perry J. Chickonoski, in his official capacity as treasurer, violated 2 U.S.C. § 433(a) by failing to timely file a Statement of Organization with the Commission.

III. RECOMMENDATIONS

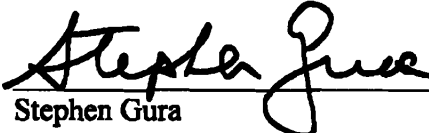
1. Find no reason to believe that Bill Johnson violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a);
2. Find no reason to believe that Bill Johnson for Congress and Perry J. Chickonoski, in his official capacity as treasurer, violated 2 U.S.C. § 433(a);
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and

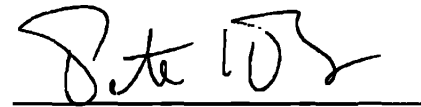
5. Close the File.

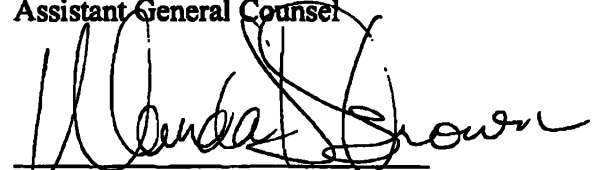
P. Christopher Hughey
Acting General Counsel

Date: 11/19/10

BY:


Stephen Gura
Deputy Associate General Counsel
for Enforcement


Peter G. Blumberg
Assistant General Counsel


Wanda D. Brown
Attorney

11044284044