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CELA

FIRST GENERAL COUNSEL'S REPORT

MUR: 6376

DATE COMPLAINT FILED: 9/16/10

DATE OF NOTIFICATION: 9/23/10

LAST RESPONSE RECEIVED: 11/19/10

DATE ACTIVATED: 11/23/10

EXPIRATION OF SOL: 8/11/15 - 8/24/15

COMPLAINANT:

Charles A. Flint, II¹

RESPONDENTS:

Lori Edwards

Lori Edwards Campaign Committee and Lori
Edwards, in her official capacity as treasurer
Polk County Supervisor of Elections Office

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441b

2 U.S.C. § 434(b)

11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint in this matter involves Lori Edwards, a 2010 congressional candidate in Florida's 12th District and the Polk County (Florida) Supervisor of Elections. Specifically, it alleges that Edwards and the Polk County Supervisor of Elections Office ("Elections Office") disseminated voter education television and radio advertisements that constituted prohibited corporate in-kind contributions, in the form of coordinated communications, to her campaign. The complaint also alleges that Edwards and the Lori Edwards Campaign Committee and Lori

¹ Mr. Flint identifies himself as the Attorney of Record for Dennis Ross, who was Edwards's opponent in the general election.

1 Edwards, in her official capacity as treasurer ("the Committee"), failed to disclose the in-kind
2 contributions. The responses argue that the ads do not constitute coordinated communications,
3 Edwards, as Supervisor of Elections, is mandated by Florida law to educate voters, and the ads
4 qualify for the charitable solicitation exemption in the coordination regulations.

5 As discussed below, based on the nature of the communications and prior Commission
6 treatment of similar matters, we recommend that the Commission exercise its prosecutorial
7 discretion and dismiss the complaint.² We also recommend that the Commission close the file.

8 II. FACTUAL AND LEGAL ANALYSIS

9 A. Facts

10 Lori Edwards is the Polk County, Florida, Supervisor of Elections, an elected, non-
11 partisan position that she has held since 2000. In 2010, Edwards was also the Democratic
12 nominee for the congressional seat that represents most of Polk County and portions of
13 Hillsborough and Osceola Counties. Polk County is an incorporated entity. The Supervisor of
14 Elections position was not on the 2010 ballot.

15 Beginning August 11, 2010, and up to the August 24, 2010, primary election, the
16 Elections Office disseminated radio and television advertisements informing voters about the
17 upcoming election and encouraging them to vote. See Elections Office Response Attachments,
18 Transcripts of Ads. The ads provided basic information about the three ways to vote – at the
19 polls, absentee voting, and early voting – and relevant dates and times. See *id.* Some ads gave
20 specific early voting locations and reminded voters to bring photo identification. *Id.* Some ads
21 mentioned that there were "important races" on the ballot, and one included the line, "If you

² One day after sending the complaint, the complainant requested that the complaint be disregarded. See Letter from Charles A. Flint, II, to Christopher Hughey, dated September 15, 2010. CELA informed the complainant that the Commission is empowered to review a complaint properly filed with it and to take action that it deems appropriate under the Act. A request to withdraw a complaint will not prevent the Commission from taking appropriate action. See Letter from CELA to Mr. Flint, dated September 24, 2010.

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1 don't vote, they can't hear you." *Id.* Edwards speaks in all of the advertisements and identifies
2 herself by name and as the Supervisor of Elections. *Id.* In the television ad for which we have a
3 video, Edwards appears and her name is displayed at the beginning and at the end for a total of
4 approximately 10 seconds of a 30-second ad. See <http://goo.gl/9SYbg>. She speaks throughout
5 the ad. *Id.*

6 Edwards and the Committee ("Edwards") and the Elections Office respond that Florida
7 law and regulations require Edwards to give non-partisan and unbiased information to voters.
8 Edwards Response at 2; Elections Office Response at 2. Specifically, Edwards cites to Florida
9 Department of State, Division of Elections Rules 1S-2.033(4)(b)(2009), which states: "A county
10 supervisor of elections shall: ... Participate in available, radio, television and print programs and
11 interviews, in both general and minority media outlets, to provide voting information."

12 Edwards and the Elections Office maintain that past "public service announcements"
13 ("PSAs") have been similar or identical to the 2010 ads and that they spent the same amount of
14 funds in 2010 as in past years. Edwards Response at 2, Elections Office Response at 1-2.
15 Further, the Elections Office asserts that the ads were not created for the purpose of influencing
16 the election or concerning campaign matters. Elections Office Response at 2. According to the
17 Elections Office, the ads cost about \$11,000. *Id.* at 2. Edwards, in a news interview, said the ads
18 cost \$14,500. See Complaint, Exhibit 7.

19 **B. Legal Analysis**

20 The complaint alleges that the ads constitute coordinated communications because they
21 meet all three prongs of the Commission's coordination regulations and, thus, resulted in the
22 Elections Office making prohibited corporate in-kind contributions to Edwards and the
23 Committee totaling \$14,500. Polk County's incorporated status is the basis for complainant's

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1 allegation that the Elections Office made, and Edwards and the Committee accepted, prohibited
2 corporate in-kind contributions. The complaint also alleges that Edwards and the Committee
3 failed to report the in-kind contributions.

4 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), no person
5 may make a contribution, including an in-kind contribution, to a candidate and his authorized
6 political committee with respect to any election for Federal office which, in the aggregate,
7 exceeds \$2,400. 2 U.S.C. § 441a(a)(1)(A) (2010 election cycle limit); see 2 U.S.C.
8 § 431(8)(A)(i), 11 C.F.R. § 100.52(d)(1) (defining "contribution"). Moreover, corporations are
9 prohibited from making any federal political contributions. 2 U.S.C. § 441b.

10 The Act defines in-kind contributions as, *inter alia*, expenditures by any person "in
11 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his
12 authorized political committees, or their agents" 2 U.S.C. § 441a(a)(7)(B)(i). The
13 Commission's regulations provide a three-prong test to determine whether a communication is
14 coordinated: (1) payment by a third party; (2) satisfaction of one of four "content" standards; and
15 (3) satisfaction of one of six "conduct" standards. See 11 C.F.R. § 109.21(a).³ All three prongs
16 of the test must be satisfied to support a conclusion that a coordinated communication occurred.
17 *Id.*

18 The payment prong of the coordination regulation requires that the communication be
19 paid for, in whole or in part, by a person other than the federal candidate or the candidate's
20 authorized committee. 11 C.F.R. § 109.21(a)(1). Edwards, relying on Advisory Opinion 2009-
21 26 (Coulson), argues that this prong is not satisfied because Edwards paid for the communication

³ The activity at issue took place before the effective date of the most recent changes to the coordination regulations. See Explanation and Justification on Coordinated Communications, 75 Fed. Reg. 55947 *et seq.* (Sept. 15, 2010) (adding, *inter alia*, new content standard and safe harbor, effective Dec. 1, 2010). Our analysis would be the same under the new regulations.

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1 in her role as the Elections Office Supervisor. Edwards Response at 3. Thus, Edwards argues
2 that the communications were not paid for by a person other than the candidate. *Id.*

3 In AO 2009-26, Coulson, an Illinois State Representative and federal candidate, asked
4 whether she could pay for certain mailers and events with her state campaign committee funds or
5 funds from a State Office Account. The State Office Account is an office allowance given to
6 Illinois state legislators for the purpose of defraying official office, personnel, and constituent
7 services expenses. AO 2009-26 at 2 (citing Illinois statute). The Commission advised that
8 Coulson could pay for the mailers with either account and that the mailers would not be
9 considered coordinated communications because the payment prong was not met. *Id.* at 7-8.
10 The Commission concluded that Coulson and her agents, not another person, would be paying
11 for the communications. *Id.* at 8. See also MUR 6207 (DeSaulnier Factual and Legal Analysis
12 at 7) (payment prong not satisfied because candidate's state committee account paid for the
13 communications).

14 The Edwards communications, on the other hand, do not appear to have been paid with
15 an officeholder's discretionary "office allowance" but rather with official government office
16 funds. Similarly, in MUR 5815 (Madrid), the Commission found reason to believe that the State
17 of New Mexico's payment for a mailer disseminated by Attorney General/federal candidate
18 Madrid satisfied the payment prong.⁴ Thus, the payment prong appears to be satisfied here.

19 The second prong, the content standard, is satisfied if, among other things, the
20 communication is an electioneering communication, which is defined as a broadcast
21 advertisement that clearly identifies a federal candidate and is targeted to the relevant electorate
22 30 days before a primary election. 11 C.F.R. §§ 100.29, 109.21(c)(1). "Clearly identified"

⁴ After an investigation, the Commission took no further action against Madrid because the communication at issue did not satisfy the conduct prong. See MUR 5815, General Counsel's Report #2.

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1 means that the name of the candidate involved appears, a photograph or drawing of the candidate
2 appears, or the identity of the candidate is apparent by unambiguous reference. 2 U.S.C.
3 § 431(18). The ads here were broadcast on television and radio fewer than 30 days before the
4 primary election in Polk County, which includes most of the 12th Congressional District.
5 Moreover, the ads identify Edwards by name and, in the case of the television ads, by image.
6 See MUR 5815 (Madrid) (Commission found reason to believe candidate's name and photograph
7 clearly identified a federal candidate but later took no further action on basis of conduct prong);
8 see also AO 2009-26 (Condon) (Commission stated that a postcard containing the candidate's
9 name and photograph and state office title "clearly identifies a federal candidate" in 2 U.S.C.
10 § 441i(f) analysis). Thus, the ads appear to satisfy the content prong.

11 The conduct prong of the coordination test is satisfied if, among other things: (1) the
12 communication is created, produced or distributed at the request or suggestion of a candidate or
13 authorized committee, or the communication is created, produced, or distributed at the
14 suggestion of the person paying for the communication and the candidate or authorized
15 committee assents to the suggestion; (2) the candidate or authorized committee is materially
16 involved in decisions regarding the content, intended audience, means or mode of
17 communication; or (3) there is substantial discussion about the communication between the
18 person paying for the communication and the candidate or the authorized committee. 11 C.F.R.
19 § 109.21(d)(1)-(3).

20 Edwards is in charge of the Elections Office that produced and disseminated the ads, and
21 she was likely materially involved in decisions regarding the content, which included her image
22 and speech, the distribution of the ads, and the intended audience. She appears to have made
23 decisions about whether or not to run the ads. See email from Lori Edwards to Neil P. Reiff

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1 dated October 6, 2010, and attached to Edwards's designation of counsel ("We had planned an
2 additional run of the voter education ads for the upcoming election. Am I correct that I should
3 cancel those immediately?"). Moreover, although the Elections Office states that there was no
4 contact between it and Edwards's campaign or staff regarding the ads, it does not say that
5 Edwards herself was not involved. *See* Elections Office Response at 2; Affidavit of Judy
6 Walker. Thus, it appears that the conduct prong is satisfied.

7 Edwards and the Committee argue that the PSAs are exempt under 11 C.F.R.
8 § 109.21(g)(2), the safe harbor for charitable solicitations. That exemption provides that a public
9 communication in which a federal candidate solicits funds for another candidate, a political
10 committee, or a 501(c) group is not a coordinated communication as long as the public
11 communication does not promote, support, attack or oppose the soliciting candidate or an
12 opponent of that candidate. Edwards cites to Advisory Opinion 2006-10 (EchoStar) to argue that
13 there need not be a solicitation for the exemption to apply because the sample ad attached to the
14 EchoStar AO is an educational PSA to raise awareness about women and heart disease.

15 The AO itself, however, discusses PSAs that solicited for 501(c) organizations. By
16 contrast, Polk County is not a 501(c) group, and the PSAs are not solicitations. Therefore, the
17 charitable solicitation exemption does not apply to the Elections Office ads. *See, e.g.,* MUR
18 6020 (Pekrsi) (Statement of Reasons of Walther, Petersen, Bauerly, Hunter and McGahn at 5,
19 n.4) (exemption not applicable because 501(c) group's ads did not solicit funds).

20 Notwithstanding that the Edwards ads appear to be coordinated communications under
21 the Commission's regulations, and no safe harbor applies, we believe that the Commission
22 should exercise its prosecutorial discretion and dismiss this matter due to the nature of the
23 communications at issue. Here, Edwards and the Elections Office disseminated voter education

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1 PSAs that strictly adhered to Edwards's official duties as Supervisor of Elections. Moreover,
2 Florida law requires that the Supervisor engage in such activities, and none of Edwards's
3 statements promotes or even mentions her candidacy for federal office. Indeed, the content of
4 her PSAs appears to be less candidate-focused than another matter that the Commission
5 dismissed involving an officeholder who made communications while simultaneously running
6 for federal office. In MUR 5770 (Laffey), City of Cranston Mayor and federal Senate candidate
7 Laffey mailed a cover letter along with yearly property tax bills to city residents that, among
8 other things, listed the accomplishments the City achieved while he was Mayor. Although the
9 letter arguably constituted a coordinated communication, the Commission exercised its
10 prosecutorial discretion and dismissed the matter, citing the nature of the communication and
11 low dollar amount involved (\$3,366). See MUR 5770 (Statement of Reasons). By contrast,
12 Edwards did not discuss her accomplishments in the PSAs as Laffey did in his letter. Instead,
13 the PSA squarely focuses on her official duties as mandated by Florida law. But see MUR 5815
14 (Madrid) (Commission found reason to believe that public information mailer regarding
15 suspected meth labs sent by Attorney General/House candidate Madrid constituted a coordinated
16 communication and authorized an investigation; after investigation, the Commission found
17 conduct prong not satisfied and took no further action).

18 Recently, in MUR 6020 (Pelosi), the Commission determined in a similar case that even
19 if a 501(c) group's advertisement featuring then-House Speaker and candidate Nancy Pelosi and
20 former Speaker Newt Gingrich satisfied the Commission's coordination standard, the exercise of
21 prosecutorial discretion warranted a dismissal. MUR 6020 (Pelosi) (Statement of Reasons of
22 Walther, Petersen, Bauerly, Hunter and McGahn). The Commission noted that the respondent
23 chose Pelosi and Gingrich for the ad to be humorous and show bipartisanship, and the purpose of

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1 the ads was to further the 501(c) group's goal of focusing public attention on the policy issue of
2 climate change, not on Pelosi's role as a candidate. *Id.* at 5-6. *See also* MUR 6207 (DeSaulnier)
3 (Commission exercised prosecutorial discretion and dismissed allegations that state
4 senator/federal candidate DeSaulnier violated 2 U.S.C. §§ 441i(e) and (f) by sending a Health
5 Services Guide to constituents that discussed local health resources and national health care
6 reform).⁵

7 Here, there are a number of factors supporting dismissal of this matter. The Elections
8 Office has apparently prepared "similar or identical" ads in the past. The purposes of the ads
9 appear to be to inform voters about voting locations, times, identification requirements, and early
10 voting/absentee voting options, and to encourage participation. The ads do not focus on
11 Edwards's role as a federal candidate and do not appear to contain any electoral content
12 regarding her candidacy. Although she is not required to appear in the ads herself, a state
13 regulation requires Edwards, as the Supervisor of Elections, to educate voters through "available
14 radio, television and print programs" to provide voting information. Under these circumstances,
15 we recommend that the Commission exercise its prosecutorial discretion, dismiss the complaint
16 in this matter, and close the file. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

17 III. RECOMMENDATIONS

- 18 1. Dismiss the allegations that Lori Edwards violated 2 U.S.C. § 441b.
19

⁵ We also considered the effect of a Section 441i(e) analysis on this matter, but we believe the Elections Office ads were not in connection with Edwards's federal election, so 441i(e) would not be applicable. Edwards did not solicit contributions, the ads did not expressly advocate for or against anyone, and Edwards was performing her official officeholder duties. *See* AO 2009-26 at 5-6 (Coulson) (senior fair not in connection with a federal election because candidate will not solicit contributions, no information about participants will be provided to candidate's committee, there will be no express advocacy of candidate's election or defeat of opponents, and no "federal election activity" as defined in the Commission's statutes and regulations will occur).

In addition, we considered whether the voter education PSAs should have contained a disclaimer and been reported as electioneering communications by the Elections Office. For the same reasons we set forth in the coordination analysis, we do not recommend that the Commission pursue this further.

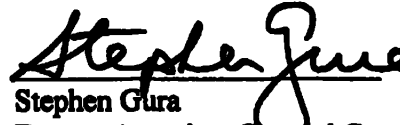
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2. Dismiss the allegations that Lori Edwards Campaign Committee and Lori Edwards, in her official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441b.
3. Dismiss the allegations that the Polk County Supervisor of Elections Office violated 2 U.S.C. § 441b.
4. Approve the attached Factual and Legal Analyses.
5. Approve the appropriate letters.
6. Close the file.

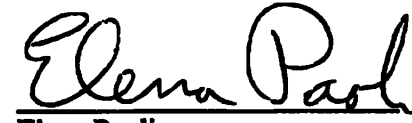
Christopher Hughey
Acting General Counsel

2/22/11
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