

2011 JUL 1 AM 8:32

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

MUR 6392

KELLY FOR CONGRESS AND

KRISTEN L. SMITH, AS TREASURER

)
) DISMISSAL AND CASE
) CLOSURE UNDER THE
) ENFORCEMENT PRIORITY
) SYSTEM
)

CELA

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring criteria to allocate its resources and decide which cases to pursue. These criteria include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both with respect to the type of activity and the amount in violation, (2) the apparent impact the alleged violation may have had on the electoral process, (3) the legal complexity of issues raised in the case, (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended ("Act"), and (5) development of the law with respect to certain subject matters. It is the Commission's policy that pursuing low-rated matters, compared to other higher-rated matters on the Enforcement docket, warrants the exercise of its prosecutorial discretion to dismiss certain cases. The Office of General Counsel has scored MUR 6392 as a low-rated matter and has also determined that it should not be referred to the Alternative Dispute Resolution Office. This Office therefore recommends that the Commission exercise its prosecutorial discretion to disruiss MUR 6392.

In this matter, the complaint alleges that Kelly for Congress and Kristen L. Smith, in her official capacity as treasurer ("Committee"), violated the Act and Commission regulations by failing to include the appropriate disclaimers in certain campaign advertisements. Kelly for Congress is the authorized committee of Jesse Kelly, who was a

11044300482

1 candidate in the 2010 election for the U.S. House of Representatives for the 8th
2 Congressional District of Arizona. Attached to the complaint is a photograph of what
3 appears to be a campaign sign that states, "Giffords' Cut \$500 Billion from Your
4 Medicare" and includes a disclaimer at the bottom stating "Paid for by Kelly for
5 Congress." Because the disclaimer is not enclosed in a printed box, the complaint alleges
6 that the Committee violated 11 C.F.R. § 110.11(c)(2)(ii).²

7 The Committee's response acknowledges that the disclaimers in some of its
8 campaign signs were not enclosed in a printed box. However, the Committee maintains
9 that these omissions were unintentional. According to the Committee, once it became
10 aware of the problem, it took "immediate corrective action" by instructing volunteers to
11 either draw a "sufficient box" around disclaimers in signs that did not comply with section
12 110.11(c)(2)(ii) or remove such signs and replace them with ones that complied with the
13 Commission's disclaimer requirement. Finally, the Committee includes a photograph of
14 what it describes as an example of one of the corrected signs, in which the disclaimer is
15 enclosed within a printed box.

16 Political committee materials that require disclaimers include, *inter alia*, campaign
17 signs, *see* 2 U.S.C. § 441d(a) and 11 C.F.R. §§ 100.26 and 110.11(a); *see also* MUR 6329
18 (Michael Grimm), General Counsel's Report at 2. Under 2 U.S.C. § 441d(c)(2) and

¹ Representative Gabrielle Giffords was Mr. Kelly's general election opponent.

² The complaint describes the disclaimer as having been typed in "tiny print," although it does not allege that the print size constitutes a violation of the Act. Under 2 U.S.C. § 441d(c)(1) and 11 C.F.R. § 110.11(c)(2)(i), a disclaimer "must be of sufficient type size to be clearly readable by the recipient of the communication." The Commission established a safe harbor of 12-point type size for disclaimers in signs and other printed communications that are no larger than 24 inches by 36 inches. 11 C.F.R. § 110.11(c)(2)(i). While the exact dimensions of the Committee's sign are not included in the complaint or response, we have no information to suggest that it is larger than 24 inches by 36 inches. Given that the type face of the disclaimer is in what appears to be 12-point type size or a type size close to it, the disclaimer appears to be of sufficient type size to be clearly readable.

11044300405

11 C.F.R. § 110.11(c)(2)(ii), a disclaimer for a printed communication must be contained in a printed box set apart from the other contents of the communication.

It appears that the campaign advertisements at issue contained sufficient identifying information to prevent the public from being misled as to who paid for them, and the violations of 2 U.S.C. § 441d(c)(2) and 11 C.F.R. § 110.11(c)(2)(ii) appear to be technical in nature. Furthermore, the Committee acknowledged that its disclaimers did not comply with the applicable statutory and regulatory requirements, and has taken remedial action to correct the deficiencies. Accordingly, under EPS, the Office of General Counsel has scored MUR 6392 as a low-rated matter and, therefore, in furtherance of the Commission's priorities, the Office of General Counsel believes that the Commission should exercise its prosecutorial discretion and dismiss this matter. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission dismiss MUR 6392, close the file, and approve the appropriate letters.

Christopher Hughey
Acting General Counsel

Date

BY:

Gregory R. Baker
Special Counsel
Complaints Examination
& Legal Administration

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17



Jeff S. Jordan
Supervisory Attorney
Complaints Examination
& Legal Administration

11044300485