

RECEIVED
FEDERAL ELECTION
COMMISSION

2010 SEP 28 AM 10: 59
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

CELA

FIRST GENERAL COUNSEL'S REPORT

Pre-MUR: 502
DATE RECEIVED: May 17, 2010
DATE SUPPLEMENTED: June 28, 2010
DATE ACTIVATED: June 2, 2010

SOL: April 21, 2015 (earliest)
May 20, 2015 (latest)

SOURCE:

RESPONDENTS:

Leonard Roberto

Roberto for Congress and Kenneth C.
Scholz, in his official capacity as treasurer

Friends of Roberto and Robert W. Schmidt,
Jr., in his official capacity as treasurer

Primary Challenge

RELEVANT STATUTES:

2 U.S.C. § 431(2)
2 U.S.C. § 441i(e)(1)(A)
11 C.F.R. § 110.3(d)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Leonard Roberto; his 2010 federal campaign committee, Roberto for Congress;
his 2010 state campaign committee, Friends of Roberto; and a pre-existing,
nonconnected, state political committee founded and controlled by Mr. Roberto, Primary
Challenge, _____ that (1) Leonard Roberto improperly
transferred \$7,226.02 in nonfederal funds from Friends of Roberto to Roberto for

10044282138

1 Congress, and (2) Primary Challenge paid the expenses for a State Senate fundraiser that
2 generated nonfederal contributions that Friends of Roberto transferred to Roberto's
3 federal campaign. _____

4 _____ reports that upon recognizing there was a
5 prohibition on making and accepting such nonfederal transfers, Roberto for Congress
6 took immediate corrective action by returning all of the nonfederal funds. *Id.*

7 Although Leonard Roberto, Roberto for Congress and Kenneth C. Scholz, in his
8 official capacity as treasurer, and Friends of Roberto and Robert W. Schmidt, Jr., in his
9 official capacity as treasurer, violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d),
10 given the overall circumstances, including the return of all prohibited funds within thirty
11 days of the original transfer _____ and the relatively small amounts
12 involved, we recommend that the Commission exercise its prosecutorial discretion to
13 dismiss this matter and send a cautionary letter to the respondents. As it does not appear
14 that the Primary Challenge payment was made in connection with a federal election, we
15 also recommend that the Commission find no reason to believe that Primary Challenge
16 violated the Act.

17 **II. FACTUAL AND LEGAL ANALYSIS**

18 **A. Factual Background**

19 Leonard Roberto was a first-time federal candidate in the September 14, 2010,
20 primary election for United States Congress in New York's 27th District. He also was a
21 candidate for the New York State Senate during a brief period in early 2010. In addition
22 to his 2010 federal and state campaigns, Mr. Roberto previously ran unsuccessfully for

10044282139

1 seats in the New York State Assembly during the 2008 election cycle and the New York
2 State Senate during the 2006 election cycle.

3 Mr. Roberto is also the founder and current president of Primary Challenge, a
4 non-partisan state political organization. See Primary Challenge,
5 <http://primarychallenge.org> (last visited Sept. 21, 2010). Primary Challenge, which Mr.
6 Roberto founded in 2005, is registered as a New York State political committee. It raises
7 funds from the public and accepts donations from corporations, unions, and trade
8 organizations.¹ Primary Challenge's stated mission is "to draft, support and infuse new
9 leadership to reduce the burden of government on the taxpayer." *Id.*

10 Friends of Roberto ("FOR") was Mr. Roberto's principal campaign committee for
11 both his 2008 bid for a seat in the New York State Assembly and his 2010 New York
12 State Senate bid. _____ FOR was
13 administratively terminated on October 23, 2008, and is currently listed as inactive on
14 New York State's official election website. See New York State Board of Elections,
15 <http://www.elections.state.ny.us> (last visited Sept. 21, 2010). Even so, on January 17,
16 2010, Mr. Roberto opened an FOR campaign account to deposit his 2010 State Senate
17 campaign receipts without formally re-registering FOR with New York state election
18 authorities. See Supplemental Submission at 1. FOR's 2010 July Periodic Report shows
19 receipts of \$10,230.09 in individual/partnership donations and \$1,000 in corporate
20 donations between January and April 2010. See New York State Board of Elections,
21 Campaign Financial Disclosure, <http://www.elections.state.ny.us> (last visited Sept. 21,

¹ New York State law permits political committees to accept contributions from corporations and labor organizations. See New York State Board of Elections, Contributions and Receipt Limitations, <http://www.elections.state.ny.us/Contributions.html> (last visited Sept. 21, 2010).

1 2010). Although the reports at the New York State Board of Elections' website do not
2 show a treasurer's name, the submission identifies FOR's treasurer as Robert W.
3 Schmidt. See Supplemental Submission at 4.

4 Roberto for Congress ("RFC") is Mr. Roberto's 2010 congressional campaign
5 committee. After Mr. Roberto finally decided to run for Congress on or about April 15,
6 2010, RFC opened a campaign account on April 21, 2010. RFC subsequently registered
7 with the Commission on May 10, 2010. Its treasurer is Kenneth Scholz.

8 Meanwhile, as part of his 2010 New York State Senate campaign, Mr. Roberto
9 had scheduled a barbecue fundraiser for FOR on April 18, 2010. Although Mr. Roberto
10 decided to run for Congress after scheduling the state campaign fundraiser, he did not
11 publicly announce his federal candidacy or that he had decided to abandon his state
12 candidacy. The submission states that Mr. Roberto did not believe it was appropriate to
13 publicly discuss his federal candidacy since he had not yet registered with the
14 Commission. _____ Instead, Mr. Roberto
15 continued with the previously scheduled April 18 State Senate campaign fundraiser
16 (without discussing his federal candidacy) and accepted \$3,800 in donations, which he
17 deposited into the FOR account. *Id.* Mr. Roberto paid \$1,272.38 in fundraising expenses
18 for this event with funds from Primary Challenge, which were reimbursed on May 3,
19 2010 with funds from the FOR account.

20 On April 21, 2010, Mr. Roberto transferred the \$3,800 in donations received at
21 the April 18 State Senate campaign fundraiser from the FOR nonfederal account to the
22 newly opened RFC federal account. _____ The submission
23 states that Mr. Roberto believed that the deposit of the FOR funds into the RFC account

10044282141

1 was lawful since the funds were from individuals eligible to contribute to a federal
2 campaign. *Id.* On May 5, 2010, Mr. Roberto deposited an additional \$3,426.02 of his
3 state campaign funds from the FOR account into the RFC account. *Id.* This deposit
4 consisted of a \$3,082.02 transfer from the FOR account, 3 state donation checks totaling
5 \$75, and \$269 in state cash donations. *Id.* Mr. Roberto used at least \$4,599 of the
6 transferred FOR nonfederal funds to pay for various congressional campaign expenses
7 between April 23, 2010 and May 4, 2010. *Id.*

8 On May 3, 2010, RFC's treasurer, Kenneth Scholz, mailed Mr. Roberto's
9 Statement of Candidacy and Statement of Organization to the Commission, and the
10 Commission received and filed them on May 10, 2010. On May 5, 2010, Mr. Roberto
11 met with Mr. Scholz to give Mr. Scholz signature authority over the RFC campaign
12 account and to discuss the transfers and other federal campaign activities Mr. Roberto
13 had already undertaken. The day after the meeting, Mr. Scholz contacted the
14 Commission's Information Division regarding the propriety of the transfers from
15 Mr. Roberto's state committee to his federal committee. After being told that the
16 transfers were impermissible under the Commission's regulations, Respondents
17 voluntarily disclosed the transactions to the Commission on May 12, 2010.

18 On May 20, 2010, RFC repaid \$7,226.02 to FOR to account for all of the
19 previously transferred funds. A total of \$4,000 of the repayment funds came from \$2,000
20 loans that Mr. Scholz and his wife each made to RFC on May 20, 2010. _____

21 _____ | FOR then refunded the state contributions

10044282142

1 to its prior donors and simultaneously solicited them for contributions to Mr. Roberto's
2 congressional campaign.² *Id.*

3 On July 2, 2010, RFC filed its first disclosure report (2010 July Quarterly Report)
4 with the Commission disclosing the financial activity described above. RFC disclosed
5 the two transfers from FOR as separate receipts, and disclosed the RFC repayment to
6 FCIR as a disbursement. RFC disclosed the two Scholz loans as both contributions and
7 unsecured interest-free loans.

8 **B. Analysis**

9 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits a
10 federal candidate, a candidate's agent, and entities established, financed, maintained or
11 controlled by them from soliciting, receiving, directing, transferring, or spending funds in
12 connection with a federal election, unless those funds are subject to the limitations,
13 prohibitions, and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A).

14 The Commission's regulations also specifically prohibit transfers of funds or
15 assets from a candidate's non-federal campaign committee or account to his or her
16 federal principal campaign committee or other authorized committee. 11 C.F.R.
17 § 110.3(d); *see also* Explanation and Justification, 57 Fed. Reg. 36,344 (August 12,
18 1992).

19 An individual becomes a federal candidate by seeking election for federal office
20 and by accepting \$5,000 in contributions or making \$5,000 in expenditures. 2 U.S.C.
21 § 431(2); 11 C.F.R. § 100.3(a). Thus, Mr. Roberto became a federal candidate after he

² FOR's 2010 July Periodic Report shows refunds of \$5,695 to 55 donors.

10044282144

1 decided to run for Congress and transferred a total of \$7,226.02 of FOR's funds into
2 RFC's bank account. See 11 C.F.R. § 100.72(b). As a federal candidate, Mr. Roberto
3 and FOR (his state campaign committee) were prohibited from transferring or spending
4 nonfederal funds in connection with his candidacy. FOR's funds were solicited for
5 Mr. Roberto's state campaign, included at least \$1,000 in corporate funds, and were not
6 subject to the Act's reporting requirements. Therefore, by transferring a total of
7 \$7,226.02 in nonfederal funds from FOR to RFC, Mr. Roberto, FOR and Robert W.
8 Schmidt, Jr., in his official capacity as treasurer, violated 2 U.S.C. § 441i(e)(1)(A) and
9 11 C.F.R. § 110.3(d). Similarly, by receiving the \$7,226.02 in nonfederal funds and
10 spending at least \$4,599 of the funds, RFC and Kenneth C. Scholz, in his official capacity
11 as treasurer, also violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).

12 Although the transfers violated the Act and Commission regulations, we do not
13 believe that the violations in this matter warrant further use of Commission resources
14 _____ In reaching this conclusion, we considered that the
15 violations do not appear to be knowing and willful, occurred over a very short period of
16 time, and the amount at issue is relatively small. Further, and significantly, Respondents
17 voluntarily disclosed the transfer and spending violations before they were discovered by
18 an outside party, promptly ceased and corrected the violations after discovery, and fully
19 cooperated with the Commission in _____ completely

1 addressed the disclosed activity.⁴ See Commission's Policy Statement Regarding *Sua*
2 *Sponte* Submissions, 72 Fed. Reg. 16,695 (Apr. 5, 2007).

3 Accordingly; we recommend that the Commission open a MUR, exercise its
4 prosecutorial discretion to dismiss this matter, but also caution Leonard Roberto, Friends
5 of Roberto and Robert W. Schmidt, Jr., in his official capacity as treasurer, and Roberto
6 for Congress and Kenneth C. Scholz, in his official capacity as treasurer, regarding
7 noncompliance with the transfer and spending prohibitions of 2 U.S.C. § 441i(e)(1)(A)
8 and 11 C.F.R. § 110.3(d).⁵ See *Heckler v. Chaney*, 470 U.S. 821 (1985). Our
9 recommendation is consistent with the Commission's decision in MUR 5919 (Rhode
10 Islanders for Jobs and Tax Relief, Inc.) (Commission simultaneously opened a MUR,
11 dismissed the matter, and issued an admonishment to one of the respondents for a
12 2 U.S.C. § 441b(a) violation). See Commission Certification dated May 31, 2007. See
13 also MURs 6170 (Tuscola County Democratic Committee) and 6163 (Houghton County

⁴ Mr. Roberto also complied with the federal candidate and committee registration requirements set forth at 2 U.S.C. §§ 432(e) and 433(a); 11 C.F.R. §§ 101.1(a), 102.1(a). He timely filed his Statement of Candidacy and Statement of Organization with the Commission on May 10, 2010 (both forms were mailed on May 3, 2010). RFC further timely disclosed its campaign receipts and disbursements in its first disclosure report as required under 2 U.S.C. § 434.

⁵ Staff review of RFC's website on June 8, 2010 showed that for a period of time the website (created sometime around April 30, 2010) did not include the required disclaimer. See 2 U.S.C. § 441d(a); 11 C.F.R. §§ 110.11(a)-(c) (requiring all websites of a political committee that are available to the general public to contain a disclaimer clearly stating that the authorized committee paid for its public communications and solicitations). Mr. Scholz, RFC's treasurer, verbally informed us that, on May 17, 2010, he requested that RFC's web provider add the disclaimer after he noticed the error. A disclaimer was placed on the website sometime prior to June 22, 2010. Since the website failed to include the requisite disclaimer for a period of time (albeit brief), RFC and its treasurer appear to have violated 2 U.S.C. § 441d(a) and 11 C.F.R. §§ 110.11(a)-(c). However, based on its prior treatment of similar disclaimer violations, we recommend that the Commission also exercise its prosecutorial discretion and not pursue this violation. See MURs 6278 (Committee to Elect Joyce Segers for Congress) and 6265 (Gause for Congress) (dismissing allegations as to brief website disclaimer violations where remedial action was taken).

10044282145

1 Democratic Committee) (dismissal of complaint generated matters with cautionary
2 letters).

3 Finally, the submission speculated that Primary Challenge may have violated the
4 Act by initially paying the expenses for the April 18, 2010 fundraiser. However, as it
5 does not appear that the Primary Challenge payment was made in connection with a
6 federal election, the payment did not violate the Act or Commission regulations.
7 Therefore, we recommend that the Commission find no reason to believe Primary
8 Challenge violated the Act in this matter.

9 **III. RECOMMENDATIONS**

- 10 1. Open a MUR.
- 11 2. Dismiss the matter based on prosecutorial discretion and send a cautionary
12 letter to Leonard Roberto; Friends of Roberto and Robert W. Schmidt, Jr., in
13 his official capacity as treasurer; and Roberto for Congress and Kenneth C.
14 Scholz, in his official capacity as treasurer.
- 15 3. Find no reason to believe Primary Challenge violated the Act.
- 16 4. Approve the attached joint Factual and Legal Analysis.
- 17 5. Approve the appropriate letters.

18


10044282146

6. Close the file.


Christopher Hughey
Acting General Counsel

Kathleen M. Guith
Acting Associate General Counsel for
Enforcement

9/28/10
Date

BY: 
Stephen Gura
Deputy Associate General Counsel for
Enforcement


Mark Shonkwiler
Assistant General Counsel


Kaman Philbert
Attorney

10044282147