



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

David Larsen

NOV 02 2016

Lebanon, NJ 08833

RE: MUR 6999

Dear Mr. Larsen:

On January 15, 2016, the Federal Election Commission ("Commission") notified you as the candidate and as the treasurer of the Exploratory Congressional Committee for David Larsen DBA: David Larsen for Congress (the "Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you and the Committee at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on October 25, 2016, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information. The Act requires that an individual must file a Statement of Candidacy with the Commission designating a principal campaign committee within 15 days of becoming a candidate and that the principal campaign committee must then file a Statement of Organization within ten days of its designation. See 52 U.S.C. §§ 30102(e) and 30103(a). The committee must then file disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b). The Commission cautions you and the Committee to take steps to ensure the timely filing of Statements of Candidacy and Organization and required disclosure reports in the future in compliance with the Act and the Commission's regulations.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Peter G. Blumberg
Acting Deputy Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENTS:** David Larsen **MUR 6999**
5 Exploratory Congressional Committee
6 for David Larsen DBA: David Larsen for Congress
7 and David Larsen in his official capacity as Treasurer
8

9 **I. INTRODUCTION**

10 This matter was generated by a Complaint filed with the Federal Election Commission
11 (the "Commission"). See 52 U.S.C. § 30109(a)(1). The Complaint alleges that House candidate
12 David Larsen violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by
13 filing a late Statement of Candidacy with the Commission. According to the Complaint, Larsen
14 made public statements throughout 2015 and engaged in other campaign-related activities that
15 triggered candidate status months before he filed his Statement of Candidacy on December 29,
16 2015. Larsen argues he was merely "testing the waters" before his official candidacy
17 announcement.

18 As discussed below, the available information indicates that Larsen had become a
19 candidate by July 20, 2015, and he therefore should have filed his Statement of Candidacy by
20 August 4, 2015. Consequently, Larsen's federal committee filed its Statement of Organization
21 late and failed to file a 2015 October Quarterly Report. However, because of the small amount
22 at issue, the Commission exercises its prosecutorial discretion and dismisses with caution the
23 allegations that Larsen filed a late Statement of Candidacy and that the Committee filed a late
24 Statement of Organization and failed to file its 2015 October Quarterly Report.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 David Larsen ran for New Jersey's 7th Congressional District in the 2010, 2012, and
4 2014 election cycles.¹ He filed a Statement of Candidacy on December 29, 2015, to run for the
5 same office in the 2016 cycle and designated the "Exploratory Congressional Committee for
6 David Larsen DBA: David Larsen for Congress" ("Committee") as his authorized campaign
7 committee.² Larsen's campaign committees for the 2010, 2012, and 2014 election cycles had the
8 same name.³

9 On January 31, 2016, the Committee filed its 2015 Year-End Report, covering activity
10 from February 2, 2015, through the end of the calendar year. The report indicates that during the
11 period Larsen states he was merely exploring a run, the campaign received \$12,225.69 in
12 contributions and \$213,513 in candidate loans, and it disbursed \$24,212.88.⁴ The campaign
13 spent \$5,000 by July 20, 2015, and it raised \$5,000 in itemized contributions by October 2,
14 2015.⁵

15 The Complaint alleges that Larsen became a candidate earlier than December 2015, as
16 shown by his public statements and fundraising events, and because a political consultant was

¹ Larsen lost the primary election in each of those election cycles. *See*
<http://www.fec.gov/pubrec/fe2010/2010house.pdf>; <http://www.fec.gov/pubrec/fe2012/2012congresults.pdf>;
<http://www.fec.gov/pubrec/fe2014/2014house.pdf>; <http://www.nj.gov/state/elections/2016-results/2016-unofficial->

² *See* http://docquery.fec.gov/cgi-bin/fecimg?_201512299004424650+0 and http://docquery.fec.gov/cgi-bin/fecimg?_201512299004424651+0. Larsen lost that primary election to incumbent Leonard Lance on June 7, 2016. https://ballotpedia.org/New_Jersey%27s_7th_Congressional_District_election,_2016.

³ *See* Statements of Organization (Jan. 8, 2010, Jan. 8, 2012, and Jan. 27, 2013), *available at*
http://docquery.fec.gov/cgi-bin/fecimg?_10030212794+0, <http://docquery.fec.gov/cgi-bin/fecimg/>, and
http://docquery.fec.gov/cgi-bin/fecimg?_13031142217+0.

⁴ *See* http://docquery.fec.gov/cgi-bin/fecimg?_201602019005299975+0.

⁵ *Id.* According to the Committee's 2015 Year-End report, its earliest reported contribution was dated June 10, 2015, and its earliest reported disbursement was made on February 2, 2015. *Id.*

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1 working for the campaign months before Larsen announced his candidacy.⁶ For example,

- 2 • June and August 2015 fundraising invitations used a logo with express advocacy
3 (see below)⁷ and they display the address to Larsen's official campaign website,
4 DavidLarsenforCongress.com, at various places on the invitations;⁸



- 5
6 • Similarly, the name of Larsen's website, Facebook page, and Twitter account
7 (DavidLarsenforCongress.com, "David Larsen for Congress-
8 @DavidLarsenforCongress," and "@Larsen4Congress") advocated his election;⁹
9
10 • Larsen made public statements that seemed to refer to himself as a candidate, and
11 advocated his election or the defeat of his primary opponent.
12

13 As to the last point, the Complaint states that Larsen was quoted at a February 2015

14 Republican event stating, "I think we'll probably do it again," "[w]e'll win this time," and "[i]t's

⁶ The Complaint also claims that the Committee's sponsorship costs (\$550) incurred for a March 31, 2015, Reagan Day event and funds raised from fundraiser ticket prices (\$150 per person) demonstrate that Larsen had become a candidate earlier than December 2015. Compl. at 2, 8, and Exs. B, D, and F. Finally, the Complaint questions the Committee's use of a professional campaign consultant, King Penna, during the time that Larsen asserts he was testing the waters. Compl. at 2. Larsen responds that Penna was a personal friend and that he has never been a paid consultant for his campaigns. Resp. at 3.

⁷ Compl. at 2, and Exs. D and F. The Committee posted links to these invitations on its Facebook and Twitter pages. *See also* Compl. at 2. During the 2016 election cycle, the same banner appeared frequently in Committee Facebook posts and tweets, as early as April 2015, and appears to be the same letterhead logo that Larsen used in his prior campaigns. *See e.g.*, <https://www.facebook.com/DavidLarsenforCongress/posts/671443122961130> (Apr. 3, 2015); @Larsen4Congress (June 23, 2015) (displaying banner with link to a media release).

⁸ The invitations solicit contributions to benefit Larsen's "2016 Exp. Congressional Campaign" and state that they are "Paid for by David Larsen for Congress Exp. Committee."

⁹ The Committee's Facebook page indicates it was created during an earlier election cycle, on January 1, 2013, and its Twitter account page, known as @Larsen4Congress, states that the Committee joined Twitter in February 2014. *See* https://www.facebook.com/DavidLarsenforCongress/info/?tab=page_info; <https://twitter.com/larsen4congress>.

1 time to do it again.”¹⁰ On February 3, 2015, the Committee tweeted a link to the same press
2 report.¹¹ On October 13, 2015, the Committee used its Twitter account, @Larsen4Congress, to
3 post a link to a press release specifically encouraging the defeat of incumbent Leonard Lance and
4 advocating Larsen’s election.¹² The release states, among other things, that residents of the 7th
5 Congressional District “. . . can join the Gun Owners of America . . . and support David Larsen
6 for Congress.”¹³ The release displays the same campaign logo shown above, includes a
7 disclaimer stating that it was paid for by the “David Larsen for Congress Exp. Committee,” and
8 lists the campaign’s website “DavidLarsenForCongress.com” underneath.¹⁴ Additional text
9 below the disclaimer lists “DavidLarsenForCongress.com” again.

10 Eighteen days before Larsen registered as a candidate, the Complainant received a
11 fundraising solicitation from the Committee by mail stating, “My name is David Larsen. I’m
12 running for Congress.”¹⁵ The mailer included a three-page letter signed by Larsen, a reply insert,
13 and a reply envelope.¹⁶ In the letter, Larsen states, among other things, “[t]his is one of the
14 reasons why I am . . . moving forward with my campaign for NJ 7th Congressional District.”¹⁷

¹⁰ Compl. at 1 and Ex. A.

¹¹ See <https://twitter.com/larsen4congress>. That appears to have been the Committee’s first tweet during the 2016 election cycle. Earlier tweets on the Committee’s Twitter page date back to June 2014.

¹² Compl. at 2 and Ex. G; see also <http://myemail.constantcontact.com/For-Immediate-Release---The-Boehner-Connection---The-Republican-Defection.html?soid=1103157500199&aid=JIchceYU3ao>. The release also appears on the Committee’s website. See <http://davidlarsenforcongress.com/pr/2015/10/09/boehner-connection-republican-defection.html>.

¹³ Compl. at Ex. G.

¹⁴ *Id.* The release also lists the same campaign contact (King Penna):

¹⁵ *Id.* at Ex. H.

¹⁶ *Id.* at 4, and Exs. H, J, K, and L.

¹⁷ *Id.* at H.

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1 The letter also asks, "return the enclosed envelope with your most generous investment into our
2 campaign for your future."¹⁸ The letter uses the same campaign logo, lists a website,
3 www.WhoisDavidLarsen.com, and includes a disclaimer: "Paid for by David Larsen for
4 Congress," along with an address and phone number. The reply insert states that it was "Paid for
5 by David Larsen for Congress *Exp.* Committee" [emphasis added] but asks that checks be made
6 payable and mailed to "David Larsen for Congress."¹⁹

7 Larsen responds that he did not become a candidate until he "officially registered" with
8 the Commission in December 2015.²⁰ Larsen notes that he "did not deploy signs, open a
9 campaign office, seek signature petitions, advertise on radio, tv or newspapers," and did not
10 actively campaign as a candidate until . . . Dec. [2015]," and primarily used his personal funds
11 during the exploratory period.²¹ Larsen further explains that the February 2015 statement was
12 his response to a reporter's question asking if he would run again. Larsen contends that he meant
13 that he might run again, not that he had already decided to run.²² He argues that his fundraisers
14 were all under the "Exploratory label" and were aimed at determining the amount of support he
15 could receive.²³ Likewise, he discounts the October 2015 tweet, explaining that the press release
16 did not actually state that he was a candidate, but rather contained "a generic statement [] that

¹⁸ *Id.*

¹⁹ *Id.* at Ex. J and K. Apparently, a nail file included with the mailing also contained the printed statement "David Larsen for Congress." *Id.* at Ex. L.

²⁰ Resp. at 1. Larsen apparently believed, however, that he needed to register as a candidate with the FEC within 30 days of his decision to become a candidate. *Id.* at 4. Thus, he appears to acknowledge that the December 11 fundraising letter was sent after he made the decision to become a candidate. *Id.*

²¹ *Id.*

²² *Id.* at 3.

²³ *Id.* He states that the sponsorship at the Reagan Day Dinner was also aimed at gauging interest and support for his campaign.

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1 hopefully [Lance and McCarthy] will be unseated.”²⁴ Larsen also notes that the disclaimer
2 identifies his exploratory committee as opposed to his authorized campaign committee but
3 acknowledges that “the last sentence [of the October press release] could have been worded
4 differently.”²⁵

5 **B. Larsen Filed a Late Statement of Candidacy**

6 An individual is deemed to be a “candidate” for purposes of the Act if he or she receives
7 contributions or makes expenditures in excess of \$5,000.²⁶ Once an individual meets the \$5,000
8 threshold, he or she has fifteen days to designate a principal campaign committee by filing a
9 Statement of Candidacy.²⁷ The principal campaign committee must then file a Statement of
10 Organization within ten days of its designation, *see* 52 U.S.C. § 30103(a), and must file
11 disclosure reports with the Commission in accordance with 52 U.S.C. § 30104(a) and (b). Any
12 change or correction in the information on a Statement of Organization must be reported to the
13 Commission within ten days of the change or correction.²⁸ Treasurers of House candidates are
14 required to file quarterly reports in non-election and election years no later than the fifteenth day
15 following the close of the immediately preceding calendar quarter.²⁹

16 The Commission has established limited exemptions from these thresholds, which permit
17 an individual to test the feasibility of a campaign for federal office without becoming a candidate
18 under the Act. Commonly referred to as the “testing the waters” exemptions, 11 C.F.R.

²⁴ *Id.* at 4.

²⁵ *Id.* at 3-4.

²⁶ 52 U.S.C. § 30101(2).

²⁷ *Id.* § 30102(e)(1); 11 C.F.R. § 101.1(a).

²⁸ 52 U.S.C. § 30103(c); 11 C.F.R. § 102.2(a)(2).

²⁹ 11 C.F.R. § 104.5(a).

1 §§ 100.72 and 100.131 exclude from the definitions of "contribution" and "expenditure,"
2 respectively, those funds received, and payments made, to determine whether an individual
3 should become a candidate.³⁰ "Testing the waters" activities include, but are not limited to,
4 payments for polling, telephone calls, and travel.³¹ An individual who is "testing the waters"
5 need not register or file disclosure reports with the Commission unless and until the individual
6 subsequently decides to run for federal office or conducts activities that indicate he or she has
7 decided to become a candidate.³²

8 Certain activities may indicate that the individual has decided to become a candidate and
9 is no longer "testing the waters." Commission regulations set out five non-exhaustive factors to
10 be considered in determining whether an individual has decided to become a candidate. An
11 individual indicates that he or she has gone beyond "testing the waters" and has decided to
12 become a candidate, for example, by making or authorizing written or oral statements that refer
13 to him or her as a candidate for a particular office.³³ These regulations seek to draw a distinction
14 between activities directed to an evaluation of the feasibility of one's candidacy, and conduct

³⁰ The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. See Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . ."). See 52 U.S.C. § 30101(8), (9).

³¹ 11 C.F.R. §§ 100.72(a), 100.131(a).

³² See *id.*; see also Advisory Op. 1979-26 (Grassley).

³³ *Id.* §§ 100.72(b), 100.131(b). The other examples set forth in these regulations indicating a person has decided to run for office include: (1) using general public political advertising to publicize his or her 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 or she becomes a candidate; (3) conducting activities in close proximity to the election or over a protracted period of time; or (4) taking action to qualify for the ballot under state law.

1 signifying that a private decision to become a candidate has been made.³⁴

2 Once an individual begins to campaign or decides to become a candidate, funds that were
3 raised or spent to “test the waters” apply to the \$5,000 threshold for qualifying as a candidate and
4 the candidate must register with the Commission.³⁵ Once an individual reaches candidate status,
5 all reportable amounts from the beginning of the testing-the-waters period must be disclosed on
6 the first financial disclosure report filed by the candidate’s committee, even if the funds were
7 received or expended prior to the current reporting period.³⁶

8 There is evidence indicating that Larsen had decided to run for Congress months before
9 his actual registration, and he became a “candidate” under the Act on July 20, 2015, when his
10 expenditures exceeded \$5,000. Most notably, the fundraising invitations the Committee sent in
11 June and August 2015 appear to publicize Larsen’s intention to run. Both invitations advertise
12 an event “hosted by Larsen for Congress.” They prominently display the “Larsen for Congress”
13 logo at the top of both invitations — the same logo the candidate used in a prior campaign. The
14 repeated references to “Larsen for Congress” and his congressional campaign, the use of “Larsen
15 for Congress” logo letterhead, the display of the “DavidLarsenForCongress” website address,
16 and the dissemination of these invitations via the “David Larsen for Congress” Facebook page
17 and @Larsen4Congress Twitter account adequately demonstrate that by June 2015, Larsen had

³⁴ See Advisory Op. 1981-32 (Askew) (“AO 1981-32”) (explaining that the testing the waters exemptions become inapplicable once the public activities of the individual take on a partisan political quality).

³⁵ 11 C.F.R. §§ 100.72(a), 100.131(a); see Factual and Legal Analysis (“F&LA”) at 3, MUR 6533 (Perry Haney); F&LA at 5, MUR 6449 (Jon Bruning).

³⁶ 11 C.F.R. §§ 101.3, 104.3(a), 104.3(b).

1 decided to run for Congress.³⁷

2 Larsen argues that the invitations did not show that he had decided to run because they
3 were sent under the name of his exploratory committee. The Commission, however, has
4 recognized that the mere use of the term "exploratory" in campaign communications is not the
5 determining factor in whether the candidate was still testing the waters.³⁸ Instead, the
6 Commission examines the rest of the communication along with the individual's activities.³⁹
7 Moreover, Larsen's references to his purported exploratory status were not clear; the invitations
8 requested "your presence at a Fundraising Event for his 2016 *Exp.* Congressional Campaign" and
9 the disclaimer at the bottom of the invitations states that it was "Paid for by David Larsen for
10 Congress *Exp.* Committee." [Emphasis Added] The invitations do not explain that "Exp." stood

³⁷ AO 1981-32 at 4 (noting that activities that represent the establishment of a campaign organization fall outside the testing the waters exemption, and recommending that the individual avoid expressions such as "Askew for President" or similar statements in "titles or headings used to identify an office . . . and on letterhead stationery"); *see, e.g.*, Statement of Reasons, Comm'r's Peterson, Hunter, McGahri & Weintraub at 2, MUR 5930 (Schuring) (distinguishing case from MUR 2615 (Harriett Wieder) in which Wieder sent solicitations using printed letterhead that referred to her as a candidate). *Cf.* MUR 6776 (Innis for Congress) (dismissing matter where, among other factors, solicitations stated the individual sought financial support while he *explored* a possible run for Congress).

³⁸ *See* F&LA at 9, MUR 6449 (Bruning) (finding that even though it was sent under the exploratory committee letterhead, the text of a solicitation itself was an indication that candidate had decided to run); Second Gen. Counsel's Rpt. at 4-6, MUR 5693 (Aronsohn) (rejecting argument that the communications at issue were covered under the testing the waters exemption merely because of their repeated use of the word "exploratory," and finding probable cause based on other language and conduct indicating the decision to become a candidate had been made); F&LA at 7-8 MUR 5363 (Sharpton) (concluding individual became a candidate six months before he filed his Statement of Candidacy based on clear statements made in his book that he was running for President and finding that the formation of an "exploratory" committee did not negate those statements or "eradicate the registration and reporting requirements that [had] been triggered").

³⁹ *See, e.g.*, Second Gen. Counsel's Rpt. at 9-10, MUR 5693 (Aronsohn) (examining candidate's statements along with indications that he was raising funds for the election and "not simply assessing the potential strength of his financial base").

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1 for “exploratory,” nor the legal significance of that word.⁴⁰ Indeed, the Committee continued to
2 use the “Exp.” abbreviation in its December fundraising letter, which Larsen acknowledges was
3 sent after he had decided to become a candidate.

4 But there is also information that Larsen may have decided to run for office four months
5 earlier than the June 2015 invitation. A February 2015 press report quotes Larsen as saying “it’s
6 time to do it again,” and “we’ll win this time,” and Larsen linked to this report on his Twitter
7 feed without correction. Larsen now claims that these statements did not mean that he had
8 decided to run, merely that he was thinking about running, and he was also quoted in the article
9 as saying as “I think we’ll probably do it again,” which offers some support for his
10 position. However, taken as a whole, including the fact that he shared a link to this report from
11 his Twitter account, the more reasonable explanation of Larsen’s statements is that he had
12 already decided to run for Congress for a fourth time.

13 But even without the February 2015 statements, we conclude that the June 2015
14 invitation showed that Larsen had decided to run for Congress, and the Committee spent more
15 than \$5,000 by July 20, 2015. Thus, Larsen should have filed his Statement of Candidacy by
16 August 4, 2015, and the Committee should have filed a Statement of Organization within the
17 next ten days. However, Larsen filed his Statement of Candidacy 147 days late, in violation of
18 52 U.S.C. § 30102(e), and the Committee filed a late Statement of Organization, in violation of

⁴⁰ Larsen sometimes used a more complete version of the Exploratory Committee’s full name on its communications during the first half of 2015. For example, on a Reagan Dinner sponsorship in March, it listed the Committee’s name as “David Larsen for Congress Exploratory Committee.” But he seemed to use both names (with and without the exploratory label) interchangeably in the Committee’s communications throughout the summer and fall. In the context of Advisory Opinions, the Commission has reiterated the need for political committees to fully identify themselves in their public communications in order to give the reader “adequate notice of the identity of the person or political committee that paid for the communication and where required, that authorized the communication.” See, e.g., Advisory Op. 2013-13 (Freshman Hold’em JFC) at 2-3; 11 C.F.R. § 110.11(c)(1). In this case, however, we do not have sufficient facts to determine if disclaimers were required for any of these communications.

1 52 U.S.C. § 30103(a). In addition, the Committee's first disclosure report should have been the
2 2015 October Quarterly Report, covering the testing the waters period through September 30,
3 2015, and it violated 52 U.S.C. § 30104(a) by failing to file it.

4 However, the amount in violation does not warrant the additional use of Commission
5 resources in this matter. Therefore, the Commission dismisses the allegations but cautions David
6 Larsen and Exploratory Congressional Committee for David Larsen DBA: David Larsen for
7 Congress and David Larsen in his official capacity as treasurer against similar violations.⁴¹

⁴¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

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