FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
General Counsel Norton
Staff Director Pehrkon

FROM: Office of the Commission Secretary

DATE: April 16, 2002

SUBJECT: Statement of Reasons for MUR 5156

Attached is a copy of the Statement of Reasons for MUR 5156 signed by Commissioner Thomas . This was received in the Commission Secretary's Office on Tuesday, July 16, 2002 at 10:07 a.m.

cc: Vincent J. Convery, Jr.
OGC Docket (5)
Press Office
Public Information
Public Records

Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C 20463

In the Matter of	)	
	)	
Mark Morton	)	**MUR 5156**
Bill Liles	)	
Don Bryant	)	
Claude Riley	)	

STATEMENT OF REASONS

COMMISSIONER SCOTT E. THOMAS

In MUR 5156, the Commission voted 4-1 to take no action and close the file on a complaint alleging that a sign expressly advocating the election of George W. Bush, apparently without the authorization of then-Governor Bush, or his committee or agents, failed to include the appropriate disclaimer required under 2 U.S.C. §441d. In so doing, we rejected the recommendation of the Office of the General Counsel that we approve a finding of reason to believe that the individuals involved failed to comply with the Federal Election Campaign Act of 1971, as amended ("the Act"), but take no further action and close the case. I write this Statement of Reasons to explain my vote with the majority, to answer issues raised by Commissioner Wold's[1] Statement of Reasons, and to address a concern illustrated by the case.

I.

The Act provides that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate that is not authorized by a candidate, an authorized political committee of a candidate, or its agents, the communication must clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or any candidate's committee. 2 U.S.C. § 441d(a)(3). Further, the Commission's regulations require that such disclaimer be presented in a "clear and conspicuous manner." 11 C.F.R. § 110.11(a)(5).

"Expressly advocating" is defined as a communication that, inter alia, uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for

[1] On April 1, 2002, Commissioner Wold was replaced on the Commission by Commissioner Michael Toner

Congress" which, in context, can have no reasonable meaning other than to urge the election or defeat or one or more clearly identified candidate(s). 11 C.F.R. §100.22.

The term "clearly identified" means "the name of the candidate involved appears [or] the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18).

On November 17, 2000, Don Dyer ("complainant") filed a complaint with the Federal Election Commission against four individuals, Mark Morton, Bill Liles, Don Bryant, and Claude Riley ("respondents"). The complaint alleged that the respondents created and erected a sign supporting then-Governor George W. Bush that did not include a disclaimer, thereby violating federal election law. The sign states:

VOTE FOR
GEORGE W. BUSH
FOR PRESIDENT
RETURN INTEGRITY TO THE WHITE HOUSE
Vote for LOWER TAXES FOR ALL TAXPAYERS
Vote for MORALITY, FAMILY VALUES, LESS GOVERNMENT
Vote for THE RIGHT TO KEEP FIREARMS
Vote for A REAL ENERGY POLICY TO LOWER FUEL PRICES
Vote for SENSIBLE ENVIRONMENTAL POLICIES
PEOPLE ARE MORE IMPORTANT THAN SNAILS AND RATS
Vote for RESPONSIBLE MEDICAL CARE FOR ALL CITIZENS
Vote for A STRONG MILITARY TO PROTECT U.S. INTERESTS
Vote for LOCAL SCHOOL CONTROL & BETTER TEACHER PAY
EAT MORE BEEF – WEAR COOL COTTON – SUPPORT FARMERS
VOTE REPUBLICAN
NOT AL GORE SOCIALISM

MUR 5156, Complaint at 3. On December 12, 2000, the Commission received a letter in response from Bill Liles, on behalf of himself and the other three respondents. In the letter, the respondents admitted that they funded the sign and recognized that it failed to include the proper disclaimer. They assert that they are not affiliated with any party nor did George W. Bush or the Republican Party endorse the sign. Their stated reason for creating the sign was because they got "tired of looking at" a sign urging support for Al Gore, made from a refrigerator box and placed on the porch of a local furniture and appliance store. Deciding that they needed something "bigger and better," they hired a professional sign painter to create their 8'x10' sign and hung it off of a cotton trailer parked across the street from the furniture store. The trailer and sign stayed in the same place during the entire election season, eventually becoming a topic of conversation at the Spudnut Shop on Main Street and the Dinner Bell Café on Hwy. 84. As word spread, people began donating money to help pay the cost for the sign. Respondents maintain this was "all a small town joke" and no one meant to break any law.

On December 6, 2001, the Commission considered the General Counsel's Report on the matter, which recommended that the Commission find reason to believe ("RTB") that the respondents violated 2 U.S.C. § 441d(a)(3), but take no further action except to send an admonishment letter and close the file. The Counsel's office concluded that the

respondents did violate 2 U.S.C. 441d(a)(3), but because the matter dealt with one stationary sign and the respondents acknowledged their error, the Commission should take no further action against them. By a 4-1 vote, with one Commissioner absent, the Commission voted to overrule the Counsel's recommendation and approve a motion to take no action at all and close the file.

II.

As the respondents admitted to their violation of the Act, the real issue was how to handle the procedures by which the matter would be resolved. The end result of both the Counsel's recommendation and Commissioner Wold's motion was the same: no further action would be taken against the respondents and the file would be closed. When it became clear that there were not enough votes to approve the Counsel's recommendation, however, I voted with the majority to approve the motion in order to avoid a confusing 3-2 split and prolonged debate.

A.

While I voted for Commissioner Wold's motion, I do not share his Statement of Reasons joined by Commissioners Mason and Smith. Commissioner Wold states that his primary reason for making the motion to take no action was because a 'reason to believe finding' is a "statement by an agency of the federal government that the agency, literally, has reason to believe that the individuals have violated Federal law," and this determination should not be "taken lightly." MUR 5156, Statement of Reasons of Commissioner Wold at 3 (March 22, 2002). I am not aware of any commissioners who take 'reason to believe' findings lightly. Moreover, the facts of this case clearly warrant a finding of 'reason to believe' that the respondents violated a provision of FECA. Though they admit it was unintentional, the fact remains that they did not comply with federal law. Section 441d sets no threshold level for enforcement nor does it differentiate between candidates, committees, or individuals. However, as I stated above, I voted with the majority of my colleagues to avoid needless debate where the end result is the same. [2]

B.

I would also like to address a separate matter Commissioner Wold takes up in his Statement of Reasons, a section in which Chairman Mason did not join. MUR 5156, Statement of Reasons of Commissioners, Mason and Smith at 1 (April 25, 2002). Part II-C of Commissioner Wold's statement expressed "serious reservations about the statutory

[2] I note that a good deal of Commissioner Wold's Statement was taken up with his theory that the Act's disclaimer provision may be unconstitutional. He certainly argued for that position (unsuccessfully) before joining the Commission. See Griset v. Fair Political Practices Commission, 107 Cal.Rptr.2d 149 (Cal., 2001). At most, such concerns would justify a 'reason to believe finding but take no further action' approach where, as here, the Office of the General Counsel had activated the matter and presented unassailable evidence of a statutory violation.

basis for using a RTB finding to express our opinion that there may have been a violation of the law, where we do not intend to pursue enforcement." MUR 5156, Statement of Reasons, Commissoner Wold at 6 (March 29, 2002). The relevant section of the Act provides that the Commission "shall" make an investigation of an alleged violation where the Commission, with the vote of four members, determines that there is reason to believe that a person has committed, or will commit, a violation of the Act. 2 U.S.C. § 437g; see also 11 C.F.R. § 111.10(f). Commissioner Wold interprets this provision as requiring the Commission to make a reason to believe finding only when it intends to proceed to the investigative step. Commissioner Wold thus concludes that there is no statutory authority for the Commission to make a 'reason to believe' finding and then take no further action.

I do not share in Commissioner Wold's conclusion. The Commission, by practice and public guidance, has made it clear that a 'reason to believe' finding does not mandate an agency investigation. As illustrated by recent cases discussed infra, the Commission has repeatedly made reason to believe findings without investigating a particular matter. Similarly, the Commission has approved advice to the regulated community that "[a]t any point during the complaint process, however, the Commission has the discretion to take no further action in a particular matter." Filing a Complaint, FEC (1998). In light of the small amounts which may be involved in some violations, as well as the insignificance of the matter relative to other matters pending before the Commission, the Commission must have the flexibility to make 'reason to believe' findings, but exercise its prosecutorial discretion and decide not to pursue a matter further. See Heckler v. Chaney, 470 U.S. 821, 831 (1985).

C.

Finally, I would like to address a critical concern highlighted by this case. During the November 6, 2001 Executive Session, the Commission first considered two MURs involving violations of § 441d(a)(3). In both cases, the Commission ultimately voted unanimously 6-0 to approve the General Counsel's recommendation to find reason to believe that § 441d(a)(3) was violated, but because of the relative insignificance of the violations, only send admonishment letters to the respondents, take no further action, and close the file. The Office of General Counsel and a majority of the Commission agree that no action should be taken against respondents here. Given that two factually comparable cases were decided in a similar fashion, it is unclear why this case should not have followed the same procedural method.

In MUR 5130, the basis for a complaint filed against the candidate Rob Simmons and his Committee, Simmons for Congress, was a full back-page ad published in the Fall 2000 issue of *The Connecticut Legionnaire*. The ad contained campaign pledges and biographical information about the candidate, but did not include a disclaimer stating the source of the ad's funding. In response, the Committee asserted that the ad as submitted included the disclaimer, but the disclaimer was inadvertently removed by the printer. However, the Committee took responsibility for failing to inspect the ad before it was published. The Commission voted 6-0 to approve the General Counsel's recommendation to find reason to believe that Simmons for Congress and Ann Simeone,

as treasurer, violated 2 U.S.C. §441d, but due to the circumstances of the case, only issue them a letter of admonishment, take no further action and close the file.

A similar case, MUR 5161, involved a campaign mailer distributed by Barney Brannon for Congress ("Committee) called "The Barney Beat," which expressly advocated the election of Barney Brannon without the required disclaimer. The New Hampshire Republican State Committee filed a complaint against the Committee alleging violation of 2 U.S.C. §441d. The campaign manager for the Committee responded by stating that the failure to include the disclaimer was an oversight and all subsequent mailers included the appropriate disclaimer. Again, the Commission voted 6-0 to approve the Counsel's recommendation to find reason to believe that Brannon for Congress and treasurer William H. Barry III violated 2 U.S.C. §441d, but besides an admonishment letter, no other action would be taken on the matter.

The vastly different treatment afforded the latter two cases raises a concern about arbitrary decision-making. Any time commissioners change the usual processing of a case in order to make 'reason to believe' findings not otherwise called for, or to reject a 'reason to believe' recommendation where there is an admitted violation, the ability to explain our action is undermined[3]. Moreover, as the amount of ink and paper now devoted to this MUR indicates, it is a terrible waste of time and research when such explanations must needlessly be crafted. The Commission should depend on procedures that result in consistent results for comparable violations. Inconsistency and variance from established practice, particularly for relatively insignificant cases, expends time and resources that could be better spent debating and resolving more pressing issues.

7/15/02
Date

Scott E. Thomas
Commissioner

[3] The Commission's Enforcement Priority System is designed to treat all cases alike under a pre-established set of criteria that ranks them and allows for activation of some and periodic dismissal of others. This approach is the best vehicle for avoiding claims of selective decision-making. Some cases may be activated and processed with 'reason to believe' findings, while other similar cases are dismissed as 'stale,' but this is based on neutral resource allocation factors-- not subjective commissioner judgments.