

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 5089
Matta Tuchman for Congress and)
Daralyn E. Reed, as Treasurer, *et al.*)

Statement of Reasons

Vice Chair Ellen L. Weintraub
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas
Commissioner Michael E. Toner

On February 24, 2004, the Commission voted 4-2 to find reason to believe Matta Tuchman for Congress and Daralyn E. Reed, as Treasurer, violated 2 U.S.C. § 441h. The Commission also found reason to believe that Deborah Buelna and Linda Coley violated 2 U.S.C. § 441h. We write this Statement to explain why we rejected the Office of General Counsel’s recommendations to find no reason to believe that Matta Tuchman for Congress, Buelna and Coley violated § 441h.

The Matta Tuchman Committee mailed a letter dated August 18, 2000 that ostensibly came from the “Orange County Democrats” and was signed by three individuals, Deborah Buelna, Linda Coley, and Ericka Belona.¹ The letter described the senders as “shocked and outraged” by Loretta Sanchez’s plan to host a fundraiser at the Playboy Mansion. The letter sharply criticizes Sanchez, stating she showed contempt for her constituents and asks the reader to remember this contempt when “Sanchez asks for our vote again in November.” The letter then asks the recipient to take a look at Sanchez’s opponent, Gloria Matta Tuchman. The mailing also contained a copy of a news article, which criticized Sanchez and spoke highly of Matta Tuchman. Both the letterhead and the return address in the upper-left-hand corner of the envelope indicated the mailing was coming from the “Orange County DEMOCRATS.” It is only in small print on the back of the envelope that the very careful reader is informed the mailing actually came from the Matta Tuchman campaign committee.

The Federal Election Campaign Act (“FECA”) prohibits an individual who is a candidate for Federal office, or her employee or agent, from fraudulently misrepresenting

¹ Ericka Belona was not included in the reason to believe finding only because she could not be located.

herself or any committee or organization under her control, as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to the other candidate or political party. 2 U.S.C. § 441h(1).

OGC recommended that the Commission find no reason to believe Matta Tuchman for Congress, Buelna and Coley violated 2 U.S.C. § 441h based on the presence of the Matta Tuchman Committee's disclaimer on the back flap of the envelope. In most cases, we would agree with the Office of General Counsel that "the inclusion of a disclaimer negates the requisite intent to deceive element of fraudulent misrepresentation, since the disclaimer discloses the source of the mailing." GC Report at 8. However, in order for that statement to be true, the disclaimer must be effective; it cannot be placed so obscurely and be presented in such fine print that a typical reader would be likely to overlook it. Our past decisions are not to the contrary. *See* MURs 3700 and 3690 (no § 441h violation where text of message was clearly satirical, disclaimer found immediately under text, and return address and postage stamp reflected true sender). Indeed, OGC concedes that the disclaimer in this case would not have satisfied FECA's disclaimer requirements. GC Report at 7 n.9 and 9 n.11.

The letterhead indicated the sender was the Orange County Democrats. The upper left corner of the envelope indicated the sender was the Orange County Democrats. The text of the letter was not satirical. In fact, the only indication that the mailing came from someone other than the Orange County Democrats was a disclaimer placed on the back flap of the envelope in very small print. The clear intent, in our view, was to mislead the reader into believing that the Orange County Democrats,² and not the Matta Tuchman campaign, sent the letter.

In light of the foregoing, we voted to find reason to believe that the Matta Tuchman campaign committee and the three individuals who signed the letter violated 2 U.S.C. § 441h by fraudulently misrepresenting themselves as writing on behalf of the Orange County Democrats in order to damage opponent Sanchez and her party.

At the same time, given the age of the case, the fact Respondents apparently are no longer active in federal politics, and the likelihood that some may have misconstrued our precedents as holding that any form of disclaimer insulated the sender of a communication from liability under § 441h, we chose to exercise prosecutorial discretion and take no further action and close the file in this matter. We wish to emphasize, however, that § 441h violations are amongst the most egregious transgressions of our Act. In enacting BCRA, Congress considered the effects of fraudulent misrepresentations and acted to strengthen penalties against those violating § 441h. Section 314 of BCRA required the U.S. Sentencing Commission to promulgate penalty guidelines for FECA violations. Those guidelines were promulgated and became effective November 1, 2003. As part of its report to Congress, the Sentencing Commission noted that violations of § 44h are "especially malicious in that they are

² The actual local party committee is called the Orange County Democratic Central Committee (a/k/a Democratic Party of Orange County FED PAC and Orange County Democratic Party). This organization was generated as a Respondent due to the confusion surrounding who was responsible for this communication. The Orange County Democratic Central Committee was not involved in this mailing. The Commission voted 6-0 to find no reason to believe that it violated 2 U.S.C. § 441d(a) and closed the file.

designed to confuse the electorate to the opponent's detriment." United States Sentencing Commission, *Report to Congress: Increased Penalties for Campaign Finance Offenses and Legislative Recommendations* (May 2003). We agree. With this Statement, we intend to put the regulated community on notice that allegations concerning § 441h violations will be taken very seriously and they will be a top Commission enforcement priority.

For the above-stated reasons, we voted to find reason to believe that Matta Tuchman for Congress and Daralyn E. Reed, as Treasurer, Deborah Buelna and Linda Coley violated 2 U.S.C. § 441h.

Ellen L. Weintraub
Vice Chair

Date

Danny L. McDonald
Commissioner

Date

Scott E. Thomas
Commissioner

Date

Michael E. Toner
Commissioner

Date