



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Sumter Electrical Cooperative, Inc.;) MUR 5931/ADR 480
James P. Duncan)

Statement of Reasons
Commissioner Cynthia L. Bauerly
Commissioner Ellen L. Weintraub

This matter concerns allegations of improper solicitations and coercion. The complaint alleged that Respondents Sumter Electric Cooperative, Inc. ("SECO") and James P. Duncan, CEO and General Manager of SECO, violated the Federal Election Campaign Act of 1971, as amended ("the Act") by improperly soliciting employees to make contributions to the Action Committee for Rural Electrification ("ACRE"), a separate segregated fund ("SSF") established for certain employees of SECO.¹ Most troubling in our view, the complaint alleged that coercion had been employed in SECO's solicitations.

Specifically, the complaint alleged that certain written communications distributed by SECO management and ACRE constituted improper solicitations that failed to inform employees of the political purpose of the separate segregated fund, that all contributions to the fund should be voluntary, and that the employees have a right to refuse to contribute without reprisal. See 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a). Furthermore, the complaint alleged that managers of SECO held one-on-one meetings, which were inherently coercive, with employees who had withdrawn their support of ACRE. Finally, the complaint alleged that SECO has been soliciting employees to contribute to ACRE during annual employee meetings that were mandatory and thus, solicited individuals outside of its restricted class in violation of 2 U.S.C. § 441b(b)(4).

Respondents denied that the written communications at issue in the complaint constituted solicitations. While respondents admitted that they did hold individual meetings with employees who ceased making contributions to ACRE, they denied that any solicitations or coercion

¹ The Complainant was International Brotherhood of Electrical Workers, Local 108 ("Local 108"), which represents some of the employees whom SECO allegedly solicited.

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occurred during these meetings.² Respondents admitted that SECO may have “unwittingly” solicited employees outside of its restricted class but contended that it took corrective action after discovering this fact.³

The Office of General Counsel (“OGC”) recommended that the Commission: 1) find reason to believe that SECO and Duncan violated 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a) by using coercion when soliciting contributions and failing to inform solicitees of the political purpose of the separate segregated fund and their right to refuse to so contribute without any reprisal; 2) find reason to believe that SECO and Duncan violated 2 U.S.C. § 441b(b)(4) and 11 C.F.R. § 114.7(a) by soliciting employees who were outside of the restricted class; and 3) authorize an investigation and the use of compulsory process. On December 2, 2008, the Commission failed by a vote of 3-3 to approve OGC's recommendations.⁴ We voted in favor of the recommendations because we believe these serious allegations warranted investigation.

After the motion to find reason to believe and open an investigation failed, we reluctantly voted with all four of our colleagues to refer the matter to the Alternative Dispute Resolution (“ADR”) Office. This was probably a mistake, born of the forlorn hope (on our part) that even without an investigation (which the Office of ADR does not have the capacity to conduct), a meaningful settlement might result. The Negotiated Settlement (“Settlement”) presented to the Commission on March 11, 2009, however, was entirely unsatisfactory because without resolving the factual dispute raised by the Complaint and Response, it absolved all liability with no remedial measures. The Settlement merely requires the respondents to comply with the law – something they are required to do regardless of whether they sign an agreement to do so. They cannot be doubly obliged to follow the law. No penalty was included, and we still do not know whether or not the allegations of coercion were well-founded. Accordingly, Commissioner Weintraub moved to reject the ADR settlement and return this matter to OGC to undertake an investigation.⁵ Unfortunately this motion was only supported by Commissioner Bauerly and the facts will remain unknown.⁶ We write this statement to explain why we thought an investigation was warranted and why we could not support the Settlement.

² At the reason to believe stage, the only information before the Commission is the complaint and the response. Interviews with the employees who took part in the allegedly coercive meetings would have been conducted after the Commission voted to authorize an investigation. Because there were not four votes to authorize such an investigation, we do not know whether the meetings were, in fact, coercive.

³ Response at 9.

⁴ Chairman Walther, Commissioners Bauerly and Weintraub voted to approve OGC's recommendations to find reason to believe that a violation had occurred and authorize an investigation; Vice-Chairman Petersen, Commissioners Hunter and McGahn voted against the motion.

⁵ As discussed in further detail below, the ADR program plays an important role in the Commission's enforcement efforts. Its inherent limits, however, including the inability to conduct investigations, makes it an inappropriate venue for some matters, as starkly demonstrated here.

⁶ Commissioners Bauerly and Weintraub voted to reject the negotiated settlement and return the matter to OGC for investigation. Chairman Walther, Vice-Chairman Petersen, and Commissioners Hunter and McGahn opposed this motion and subsequently voted to approve the settlement agreement (which Commissioners Bauerly and Weintraub opposed).

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Background

SECO is an electric cooperative with 379 employees. At the time of this matter, 200 employees were cooperative members and 171 were represented by the International Brotherhood of Electrical Workers ("IBEW").⁷ SECO is a member of the National Rural Electric Cooperative Association ("NRECA"). NRECA established ACRE, a political action committee ("PAC" or "SSF") registered with the Commission, for its affiliated cooperatives' employees. As a member and affiliate of NRECA, SECO has been acting as a collecting agent for ACRE and soliciting contributions for ACRE from certain SECO employees, including bargaining unit employees. SECO enabled all employees to make contributions to ACRE through automatic payroll deductions. From May through June 2007, approximately 65 bargaining unit employees (in connection with a labor dispute) discontinued their deductions to ACRE. In response, Duncan and ACRE representatives sent two written communications to, and held individual meetings with, those SECO employees who had withdrawn their support for the PAC and sent an additional communication to all SECO employees.

The Written Communications

According to the complaint, on or about June 5, 2007, the CEO of SECO, James Duncan, sent a letter to only those employees who had discontinued their payroll deductions to ACRE.⁸ In the letter, Duncan expressed his "personal disappointment" in the employees for "withdraw[ing] support" and noting the employees were "apparently never committed to ACRE in the first place."⁹

Two days later, in a June 7, 2007 memo to all employees, Duncan stated, "Frankly, I am still struggling to understand how withdrawing financial support from needy individuals within the community and withdrawing support from an organization that lobbies daily to assure that cooperatives and their employees are protected, has anything to do with the Union contract."¹⁰ He also wrote "I hope those of you who have withdrawn your support for both the United Way and ACRE will reconsider your decision. I hope the vast majority of you will continue to support both because it is the right thing to do."¹¹

Finally, also on June 7, 2007, the "elected representatives of the ACRE Committee" also sent out a letter on SECO letterhead to only the group of employees that had discontinued their deductions. This letter acknowledged that while employees had a right to terminate their contributions to ACRE, the ACRE Committee was "very disappointed" with the employees'

⁷ See Response at 1.

⁸ Complaint Ex. 1.

⁹ *Id.*

¹⁰ Complaint Ex. 2. The bargaining unit employees had also discontinued their deductions to United Way as part of the labor dispute.

¹¹ *Id.*

decision and asked "that you rethink the recent action you took," closing with "we hope that you will have a change of heart."¹²

The complaint alleged that these communications were solicitations that should have included notices concerning the voluntariness of contributions as specified in 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a). The response denied that these communications were solicitations at all, and some of our colleagues agreed. We confess we are mystified as to how they could have reached that conclusion.

When a CEO expresses his "personal disappointment" that employees have exercised their constitutional right to choose not to contribute and then attempts to persuade them to "reconsider" and "support" the PAC "because it is the right thing to do," it is hard to imagine how these words could be construed as anything but a solicitation. This was not a mere supervisor but the CEO of the company, who explicitly said: "I hope those of you who have withdrawn your support for both the United Way and ACRE will reconsider your decision."¹³ The only way they could reconsider would be to reinstate their support and contribute to the PAC. He was asking them to do so. Asking for a contribution is a solicitation. The Act and the Commission's regulations and precedents on this are clear.

Under the Act and Commission regulations, an incorporated cooperative, such as SECO, may solicit contributions to its separate segregated fund from members and executive and administrative personnel, and the families thereof.¹⁴ In relevant advisory opinions, the Commission has explained that a communication regarding SSF activity is a solicitation under 2 U.S.C. § 441b where the communication encourages or facilitates contributions to the SSF or praises employees for contributing.¹⁵ If the communication merely mentions the SSF or only engenders inquiry but does not encourage contributions, the communication is not a solicitation. *See, e.g.*, AO 2000-07 (Alcatel USA) (statement on corporate intranet generally describing functions of SSF not a solicitation); AO 1983-38 (DuPont) (article in company publication announcing formation of SSF and discussing general factual information not a solicitation).

The Act also requires that all contributions to an SSF must be voluntary and without coercion. *See* 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a); *see also* AO 2003-14 (Home Depot). In order to ensure that contributions solicited for a separate segregated fund are voluntary, a solicitation for contributions, whether written or oral, must inform the employee or member being solicited at the time of the solicitation of the political purposes of the separate segregated fund and of his or her right to refuse to so contribute without any reprisal. *See* 2 U.S.C. § 441b(b)(3)(B)-(C); 11 C.F.R. § 114.5(a)(3)-(5); *see also* MUR 5681 (High Point); MUR 5337 (First Consumers National Bank); MUR 5208 (Amboy National Bank).

¹² Complaint Ex. 3.

¹³ Complaint Ex. 2.

¹⁴ *See* 2 U.S.C. § 441b(b)(4)(C); 11 C.F.R. § 114.7(a); *see also* AO 1999-40 (NRECA), AO 2006-17 (Berkeley Electric Cooperative PAC).

¹⁵ *See, e.g.*, AO 2003-14 (Home Depot), AO 2000-07 (Alcatel USA).

These precedents establish that the three written communications from Duncan and ACRE constituted solicitations. By expressing his “personal disappointment” in those employees who chose to discontinue their contributions to ACRE, Duncan was chastising such individuals and attempting to persuade them to reverse their decisions.¹⁶ In the June 7, 2007 memorandum, Duncan again voiced his displeasure at employees’ decision to terminate support for ACRE and solicited contributions by asking employees to “reconsider” their decisions.¹⁷ Finally, in the June 7, 2007 letter from the ACRE Committee, the Committee repeated Duncan’s sentiments by writing, “we are very disappointed with your decisions” and encouraged support for ACRE by describing “the value of this program.”¹⁸ The ACRE Committee letter also asked employees to reconsider their decision to terminate support for ACRE by stating, “we respectfully ask that you rethink the recent action you took.”¹⁹ The letter concluded, “[w]e hope that you will have a change of heart.”²⁰ Contrary to the respondents’ assertions, these communications did more than merely reference the SSF or engender inquiry. Rather, the communications encouraged support of ACRE by touting ACRE’s benefits to SECO, criticizing the withdrawal of support, and actively requesting that employees change course and renew their contributions to ACRE.

Because SECO’s communications constituted solicitations, they were required to notify solicitees of the purpose of the SSF and the right to refuse to contribute without reprisal as specified in 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a). They failed to do so. While the letter from the ACRE Committee acknowledged that contributions were voluntary and that employees had a right to terminate their participation in the payroll deduction program, none of the communications contained all of the required notices. Furthermore, including the term “voluntary” does not cure a solicitation that does not otherwise satisfy all of the requirements of 11 C.F.R. § 114.5(a).²¹ Thus, the Commission should have found reason to believe that SECO and Duncan violated 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a)(3)-(5) by failing to notify solicitees of the purpose of the SSF and the right to refuse to contribute without reprisal in communications soliciting contributions to ACRE.

The Individual Meetings

In addition to the written communications, the complaint asserted that in June 2007, SECO managers called those employees who had withdrawn their support for ACRE into one-on-one meetings and encouraged them to contribute to ACRE. The complaint alleged that these

¹⁶ Complaint Ex. 1.

¹⁷ Complaint Ex. 2, at 2.

¹⁸ Complaint Ex. 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ The Commission has concluded that even if a solicitation asks for “voluntary contributions, merely including the word [voluntary] once does not diminish the coercive nature of the solicitations or satisfy the requirements of 11 C.F.R. § 114.5(a)(2)-(4).” MUR 5337, Conciliation Agreement at ¶ 13.

meetings with subordinate employees were “inherently coercive and constituted threats of job discrimination and/or reprisal for failure to contribute to ACRE.”²²

The response did not dispute that the meetings occurred but contended that the management neither solicited nor coerced employees during the meetings. The response claimed that the communications and meetings were intended to address misinformation the union was disseminating regarding a labor dispute.

The mere fact that SECO held meetings with these employees suggests that it monitored who contributed and who did not. Indeed, monitoring of employee contributions is indicative of coercion. *See* MUR 5379 (Penelas) (finding that monitoring of who did and who did not contribute to be coercive); MUR 4780 (Harris) (finding no reason to believe facilitation took place and no coercion, in part because the employer kept no records and no inquiries regarding who contributed). Although the response claimed that employees are told that SECO “does not review who contributes and who does not contribute to ACRE,”²³ SECO apparently did review employee contributions. It knew exactly who had stopped contributing and targeted these meetings and communications to those individuals.

In an attempt to rebut the allegations, the response provided affidavits from three SECO managers who stated that the managers who met with individual employees neither solicited nor coerced the employees. However, only two of the affiants, Carl Cole and Charles Castle, personally held any of the meetings at issue, and they only held 9 out of the 65 meetings with employees who requested that their contributions to ACRE be terminated.²⁴ The affidavits thus leave open questions as to what was said to the other 56 employees by other SECO managers and whether any of those conversations might have been coercive.

More significantly, the Commission cannot adequately address a charge of coercion by reviewing only the version of events provided by those alleged to have been doing the coercing. It must also hear from those in the less powerful position; those alleged to have been coerced. This is why the need for an investigation was so critical in this case. It is undisputed that those with more economic power met one-on-one with those with less economic power and that employees were selected for these meetings based on their failure to continue to support the PAC. These meetings with managers took place in conjunction with two separate communications by the CEO expressing in no uncertain terms his view that these employees should renew their support for the PAC. It is not surprising that the complainant viewed these meetings as “inherently coercive.” By declining to even inquire into whether these colorable allegations could be substantiated, the Commission was derelict in its duty to ensure that contributions to SSFs do not result from coercion. The Commission should have found reason to

²² Complaint at ¶¶ 12, 23.

²³ Response at 8.

²⁴ Cole held separate one-on-one meetings with five employees, and Castle held separate one-on-one meetings with four employees. *See* Affidavits of Carl Cole and Charles Castle.

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believe that SECO violated 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a) by using coercion to solicit contributions and should have opened an investigation.

To be clear: It may well be that nothing untoward took place during these meetings. What is frustrating is that we will never know because the Commission failed to authorize an investigation.

The Annual Meetings

Finally, the complaint alleged that, at least once a year, SECO requires all employees to attend "mandatory" meetings at its corporate headquarters during which SECO solicits employees to contribute to ACRE, thereby constituting impermissible solicitations outside of the restricted class. During the meetings, employees allegedly are required to complete and return forms indicating whether they will contribute or not. The complaint contended that at some of these meetings, employees are given pins or other gifts based on the amount of their contributions.

In their response, respondents stated that the annual meetings are not mandatory. They explained that the main purpose of the annual meetings is to discuss employee benefits. After such discussion, there is a fifteen minute break, and an ACRE presentation begins after that. They asserted that not all Sumter employees stay for the ACRE presentation, and those who do attend are verbally told that contributions are voluntary.²⁵

With respect to the annual meetings, there is no dispute that SECO solicited contributions. Respondents have provided a sample solicitation form that was distributed at the 2006 meeting during the ACRE presentation.²⁶ The form constitutes a solicitation by facilitating contributions to the SSF. *See, e.g.*, AO 2000-07, at 4. While the form states that solicitees have a right to refuse to contribute, the form does not state the purpose of ACRE.²⁷ Respondents have submitted an affidavit stating that solicitees were informed of the purpose at the meeting, presumably orally, but 11 C.F.R. § 114.5(a)(5) states that all "written solicitations" must contain all required disclosures. Further, although the form contains suggested guidelines for contributions, it fails to state that an individual was free to contribute more or less than the guidelines suggested. *See* 11 C.F.R. § 114.5(a)(2); AO 2006-17 (Berkeley Electrical Cooperative). Thus, the Commission should have found reason to believe that SECO violated 11 C.F.R. § 114.5(a)(2).

Moreover, respondents admitted that SECO may have "unwittingly" solicited beyond the restricted class,²⁸ in violation of 2 U.S.C. § 441b(b)(4) and 11 C.F.R. § 114.7(a). The response did not explain how SECO actually solicited these individuals, although it did note that SECO

²⁵ *See* Response, Affidavit of Barry Bowman.

²⁶ *See* Response, unlettered Attachment, "ACRE 2007 Membership Drive."

²⁷ *Id.*

²⁸ Response at 9.

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had taken corrective action. Of the 322 current employees who have made contributions to ACRE through SECO, the response estimated that 108 of those contributors were outside of SECO's restricted class.²⁹ That is not an insignificant proportion of "unwitting" violations. Thus, the Commission should have found reason to believe that SECO and Duncan violated 2 U.S.C. § 441b(b)(4) and 11 C.F.R. § 114.7(a) by soliciting individuals outside of its restricted class.

The ADR Settlement Agreement

The ADR program is designed to "encourage[] parties to engage in negotiations that promptly lead to the resolution of their dispute,"³⁰ which is a worthy goal. However, not all matters can be resolved through negotiation, particularly matters where key facts need to be established, as in this matter. The ADR Settlement approved by the Commission acknowledges that respondents have violated the law but exacts no penalty. It requires nothing of the Respondents that they were not legally required to do already.³¹ In some respects, it appears to require less: To avoid future violations, Respondents commit to various steps, including reviewing the employment status of new employees "to determine whether they are eligible to be solicited" and sending "written notification to current employees/ACRE contributors on an annual basis reminding them of the eligibility requirements *and the employee's responsibility to notify SECO of any changes in their eligibility.*"³² Thus, once SECO has checked the status of a new hire, the Settlement appears to put the onus on employees whose eligibility status changes affirmatively to ward off improper solicitations, rather than placing responsibility to avoid improper solicitations where it rightly belongs, with the respondents. *See* 2 U.S.C. § 441b(b)(4) and 11 C.F.R. § 114.7(a). It is not clear why the Commission would approve such a provision, particularly with respect to a respondent that has admitted it has improperly solicited outside the restricted class before.

The Settlement entered into with the Respondent does not address via confirmation or refutation the serious allegations of coercion made against SECO. The reason that the Settlement does not address these allegations is because the ADR Office is not designed to, and does not have the capacity to, conduct investigations. Our ADR Office was asked to reach an agreement with the Respondents - and it did.³³ We could not support the resulting Settlement because it leaves unaddressed the most serious allegations in the complaint.

The Courts have addressed the concept of voluntary contributions - and have consistently sided with the right of the employee to refuse to contribute. When invalidating a union's involuntary check-off process for funding its PAC from its membership, the D.C. Circuit wrote: "The same interest advanced by *Buckley* [prevention of corruption and the appearance of

²⁹ *Id.*

³⁰ FEC Website, available at: <http://www.fec.gov/pages/brochures/adr.shtml>.

³¹ *See* ADR 480 (MUR 5931).

³² *See* Settlement ¶ 9, (emphasis added).

³³ And while we may disagree with the concessions in this Settlement, it is hard to fault the ADR Office for not securing greater concessions when there was no support for a tough negotiating stance from the Commission.

corruption] is also served by ensuring that every dollar in that political action fund is knowingly and intentionally given. To achieve that, the burden must be on the solicitor and not the dissenter." *FEC v. NEA*, 457 F.Supp. 1102, 1109 (D.D.C. 1978). When discussing what would become § 441b(b)(3) in a floor debate, Congressman Thompson referred to "the coercion inherent in the solicitation of employees by employers."³⁴ While Congress has allowed employers to solicit from their employees, it has done so within strict limits. Only certain employees may be solicited. Moreover, every solicitation must be accompanied by a disclaimer that such a solicitation is voluntary and refusal to contribute will not result in reprisals, specifically because the possibility of such coercion is inherent in the process.

Conclusion

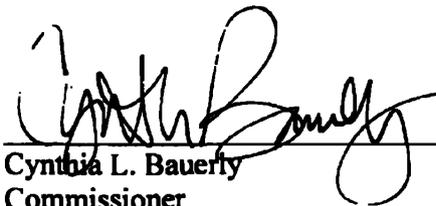
The outcome of this matter should satisfy no one. Serious allegations go unaddressed and uninvestigated and a cloud remains. Our colleagues' refusal to authorize even a limited investigation means we will never either confirm the complainant's allegations or clear respondents' names. Both the complainant and the respondents deserve better.

One of our jobs as Commissioners is to protect the ability of all citizens to contribute, if they wish, to the political causes of their choice. But an equally important duty is to protect with equal vigor the right of every citizen to choose to decline to make such a contribution. It is for these reasons that we originally voted to find reason to believe there was a violation in MUR 5931 and why we voted to reject the ADR Settlement Agreement reached in this matter.



Ellen L. Weintraub
Commissioner

4/7/09
Date



Cynthia L. Bauerly
Commissioner

4/7/09
Date

³⁴ 122 Cong. Rec. 8881 (1976) (remarks of Rep. Thompson).

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