



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Kieran Michael Lalor)	MUR 5945
Kieran Michael Lalor 2008 and)	
Christine Chisholm, in her official)	
capacity as treasurer)	

STATEMENT OF REASONS OF COMMISSIONER ELLEN L. WEINTRAUB

Recently, the Commission had occasion to consider three "testing the waters" matters presenting a range of fact patterns. MUR 5930 (Schuring) presented to me an easy case that clearly fell within the exemption because the respondent's conditional statements about his prospective candidacy were predicated on an external act that might or might not have taken place. MUR 5934 (Thompson) presented a much closer case, but on balance, given the respondent's careful and ambiguous statements, I was willing to give him the benefit of the doubt as to when he finally decided to become a candidate. In this matter, however, the respondent's activities and statements plainly exceeded the limits of the testing the waters exemption. I write this statement to explain why I believe the facts of this case warranted a reason to believe finding and are distinguishable from MURs 5930 and 5934, where I voted to dismiss.

In this matter, the Office of General Counsel (OGC) recommended that the Commission find reason to believe that Kieran Michael Lalor, his committee, and treasurer, in his official capacity, violated 2 U.S.C. §§ 432(e)(1); 433(a); and 434(a)(2) of the Federal Election Campaign Act of 1971, as amended (the Act), by failing to timely file the candidate's Statement of Candidacy, and the campaign's Statement of Organization and quarterly disclosure reports. I agreed with OGC that Mr. Lalor's public statements indicated that he had decided to become a federal candidate before he filed his Statement of Candidacy on November 25, 2007 (over a month after the complaint was filed) and voted to approve Counsel's recommendations.¹

Under the Act, an individual becomes a candidate for federal office when the individual has received or made contributions or expenditures in excess of \$5,000, 2 U.S.C. § 431(2), and

¹ Chairman Walther, Commissioner Bauerly, and I voted to approve OGC's recommendations to find reason to believe that a violation had occurred and authorize conciliation, which Vice-Chairman Petersen, Commissioners Hunter and McGahn opposed. Vice-Chairman Petersen, Commissioners Hunter and McGahn then voted to dismiss the case pursuant to the Commission's prosecutorial discretion, but Chairman Walther, Commissioner Bauerly, and I dissented. Without sufficient votes to find reason to believe or to dismiss as an exercise of prosecutorial discretion, all six Commissioners voted to close the file.

29044230474

then has fifteen days to file a Statement of Candidacy with the Commission, 2 U.S.C. § 432(e)(1). Thus, Congress anticipated that once an individual raised or spent more than \$5,000, that individual would commence disclosure obligations under the Act.

The Commission, by regulation, created an exemption for activities designed to “test the waters.” 11 C.F.R. §§ 100.72 and 100.131. While testing the waters, the individual need not file reports with the Commission disclosing money received and spent, although all such activity is subject to the Act’s limits and prohibitions. *Id.* If the individual becomes a candidate, all such financial activity must be reported. *Id.*

During the testing the waters period, the individual may conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy. *Id.* Under Commission regulations, certain activities may indicate that an individual is no longer testing the waters, such as: running general political advertising; raising funds in excess of that which would be reasonably required for exploratory activities; making or authorizing written or oral statements referring to the individual as a candidate; conducting activities in close proximity to the election; and taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b) and 100.131(b).

The testing the waters exemption is explicitly limited to funds received or payments made “*solely for the purpose of determining* whether an individual should become a candidate.” 11 C.F.R. §§ 100.72(a) and 100.131(a) (emphasis added). By its terms, it “does not apply to funds received [or payments made] for activities indicating that an individual *has decided* to become a candidate for a particular office or for activities relevant to conducting a campaign.” 11 C.F.R. §§ 100.72(b) and 100.131(b) (emphasis added). The exemption is not intended to allow candidates to delay their disclosure obligations for purposes of political expediency. It merely allows individuals to postpone their reporting obligations until they have truly decided to run. Thus, the Commission must exercise care not to construe its own exemption so broadly as to defeat Congress’s purposes in mandating candidate disclosure.

It may be objectively impossible to determine when a candidate in his or her own mind definitely decides to run. The Commission must rely on external manifestations, what the individual does and says, in deciding a case such as this. It is not unfair, and in no way burdens an individual’s First Amendment freedoms of speech or association, to assume that the individual means what he says. In MUR 5934, I reviewed Senator Thompson’s words and while he certainly hinted, I could not find that he had unambiguously stated that he had made up his mind to run earlier than when he filed his Statement of Candidacy. Here, by contrast, Mr. Lalor made just such an unambiguous statement. Finding reason to believe in this case would not read the testing the waters exemption out of the regulations, but rather would give it content and scope. The alternative is to defer in all cases to candidates and allow them to delay their statutory disclosure obligations at their pleasure.

In this matter, Mr. Lalor made a number of statements to the media, ranging over several months (April to September), that indicated he was no longer testing the waters. These statements were obviously intended for public consumption, and the resulting articles were then

29044230475

29044230476

posted to Mr. Lalor's campaign website.² Presumably he would not have posted them if he thought the articles misrepresented his views or contained "off-the-cuff" comments or "political rhetoric" that on further review he regretted or wished to disavow.

In April 2007, when announcing that he had raised \$20,000, Mr. Lalor stated: "The early support for my candidacy is confirmation that voters in the district are excited to embrace a true conservative." David Paulsen, *Iraq Vet Eyes Hall Challenge*, POUGHKEEPSIE JOURNAL, April 4, 2007. He also said: "The more people I meet, the more I'm encouraged that I am going to ultimately make the decision to run . . . It would take something major – maybe the second coming of Ronald Reagan in the 19th District – to take me off track." *Iraq Vet Touts 'True Conservatism' In New York 19 Take Back Bid*, THE NEW YORK TIMES/CQPOLITICS.COM, April 10, 2007. He reiterated this sentiment in another interview, stating: "Unless the second coming of Ronald Reagan pops up in the 19th, I'm here to stay." See Response, Exhibit A. In September 2007, Mr. Lalor stated: "My campaign of ideas and solutions stands in stark contrast to Saul's candidacy of carefully calculated issue avoidance." *Saul Stands For Nothing But The Bottom Line*, NORTHCOUNTYNEWS.COM, September 21, 2007.

Mr. Lalor's present tense references to "my candidacy" and "my campaign" suggest that he was no longer testing the waters, but running for office. That he had made up his mind was clear when he stated: "Unless the second coming of Ronald Reagan pops up in the 19th, I'm here to stay."³

In MUR 5930, the prospective candidate, Mr. Schuring, postponed his final decision (and thus his Statement of Candidacy) until the incumbent decided whether or not he was retiring. If the incumbent had decided to run again, Mr. Schuring would not have. Mr. Schuring's conditional statements thus reflected that until the incumbent announced his retirement, there was a realistic possibility that Mr. Schuring would not enter the race.

In this case, the facts are very different. It cannot be seriously suggested that Mr. Lalor was delaying his decision while he waited to see if indeed the second coming of Ronald Reagan might take place in his district. There was no condition precedent to Mr. Lalor's decision. To

² Mr. Lalor's website, www.kml2008.com, is understandably no longer active. Attempts to view the website through www.archive.org received the following response: "We're sorry, access to <http://www.kml2008.com> has been blocked by the site owner via robots.txt."

³ In their Statement of Reasons in this matter, Vice Chairman Petersen and Commissioners Hunter and McGahn avoid discussing this clear statement that Mr. Lalor had indeed made up his mind. They do, however, construct a convoluted argument, leaping from the definition of "federal election activity" to a paean to free association rights, to preclude the Commission from considering the text of an advertisement Mr. Lalor placed in a political party dinner program because it supposedly was not intended for the general public. (Complaint Exhibit B, discussed in Statement of Reasons in MUR 5945 of Vice Chairman Petersen and Commissioners Hunter and McGahn, at page 3). Without addressing the many twists and turns of this argument, I will simply note that OGC established that Mr. Lalor made the identical statement public by posting it on his campaign website. The not-intended-for-the-general-public argument is clearly a red herring. Even when the candidate was speaking on the record with the press, my colleagues "decline any invitation to require the Commission to police and parse conversations between an individual who may be seeking federal office and a reporter" and also decline to review prepared text, as described above. One wonders whether there is anything that an individual could say or write that would persuade my colleagues that the person is running for office.

the contrary, the candidate's statements demonstrated his firm commitment to run for office, a decision from which only a miracle would have dissuaded him. His purportedly conditional statements did not express indecision or allude to any realistic contingency under which he would not run. Rather, the candidate's own words emphasized that he was already in the race for the duration: "I'm here to stay."

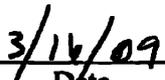
Mr. Lalor's meaning was plain, and his statements were consistent with the words of other candidates in previous cases where the Commission found reason to believe the scope of the testing the waters exemption had been exceeded. *See, e.g.*, MUR 5363 (Sharpton), MUR 5251 (Rogers).

Mr. Lalor does not deny that he made any of the quoted statements. He contends, however, that because his website and correspondence included the words "Congressional Exploratory Committee" that he could still take advantage of the testing the waters provision. Simply labeling a committee "exploratory," however, does not negate the effect of the candidate's otherwise clear actions and statements. This defense has recently been considered and rejected by the Commission. *See* MUR 5693 (Aronsohn).⁴

For these reasons, I supported the General Counsel's recommendation to find reason to believe that Mr. Lalor and his committee impermissibly delayed fulfilling his reporting requirements as a candidate under the Act.



Ellen L. Weintraub, Commissioner



Date

⁴ The dissenting Commissioners also raise the *in terrorem* argument that a reason-to-believe finding will "subject Respondents to an intrusive process and a potentially significant civil penalty." Petersen/Hunter/McGahn Statement of Reasons at 3. This is an argument for never going forward and ignores that the scope of any investigation and the size of any civil penalty is squarely within the Commission's control. My colleagues so reflexively make this argument that they apparently failed to notice its complete inapplicability to this case. In this case, the motion they refused to support called for proceeding straight to pre-probable cause conciliation without investigation of any kind (i.e., no intrusive process) and would have authorized seeking a very modest penalty. When that motion failed, I moved to reduce the penalty further to a token amount, but this second attempt similarly failed on a 3-3 vote (with respect to both motions, Chairman Walther, Commissioner Bauerly and I voted in favor, while Vice Chairman Petersen, and Commissioners Hunter and McGahn opposed). *See* Certification, dated February 3, 2009. Clearly, neither the intrusiveness of the process nor the size of the penalty was truly at issue here.

29044230477