

SANDLER REIFF

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February 3, 2021

Ms. Dayna C. Brown
Acting Assistant Staff Director
Audit Division
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Dear Ms. Brown:

The Kentucky State Democratic Central Executive Committee (“KSDCEC”) is in receipt of the Draft Final Audit Report (“DFAR”) of the Federal Election Commission’s Audit Division (“the Audit Division”) for the period covering the KSDCEC’s financial activities for 2017 and 2018. While the KSDCEC does not request a formal hearing it provides the following comments regarding the DFAR.

Finding #2

The Audit Division’s Interim Audit Report’s (“IAR”) second finding involved the purported receipt of contributions in excess of the annual federal limit of \$10,000. This finding relates to a small number of institutional contributors who make annual contributions to the KSDCEC. Each donor’s intent was to make a contribution that was to be split between the KSDCEC’s federal and non-federal account. It is the KSDCEC’s contention that these annual, institutional donors gave with the understanding that their contributions were to be split between federal and non-federal funds and that no specific documentation is required to effectuate that intent.¹ Of course, the KSDCEC transferred the non-federal portion of these contributions to a non-federal account in a timely manner.

In response to the Interim Audit Report, the KSDCEC sent letters to each donor that confirmed that their contribution was split between their federal account and non-federal account and offered the opportunity of a refund in lieu of the transfer of the non-federal share of these contributions. It was the understanding of the KSDCEC that the sending of these letters satisfied the Audit Division’s recommendations relating to this finding.

¹ None of the regulations cited in the Audit Report’s analysis related to this matter appear to directly address the splitting of federal contributions between federal and non-federal account. Draft Final Audit Report pp. 8-9.

The KSDCEC did not receive any correspondence from the donors after the sending of these letters to the donors. In addition, notwithstanding the above, the KSDCEC currently sends these letters contemporaneously with the receipt of contributions that will be split between federal and non-federal dollars.

Now, the Audit Division seems to be moving the goal post by requesting that the KSDCEC provide more documentation related to this finding. We find this request to be highly unusual and any additional requests for documentation should have been made during the field portion of the audit, not at the near conclusion of the process.

By this letter, KSDCEC hereby notifies the Commission that no additional information exists related to this finding. To be sure, these long-time institutional donors were not asked, nor are required to sign any donor card or any other forms when contributing to the KSDCEC. As noted above, the KSDCEC will send notification of split contributions at the time of receipt in the future. By asking for additional information, the Audit Division is causing confusion as to what exactly is the necessary requirements related to the splitting of these contributions.

Is a timely letter identical to the ones sent by the KSDCEC during the IAR process sufficient for compliance with the Act, or are committees now required to undertake more than that? This language requesting additional information should either be deleted from the Final Audit Report, or more clarity must be provided to the regulated community as to what is sufficient for purposes of compliance with the issues addressed in Finding 2 by a state party committee.

Finding #4

The IAR's fourth finding involves volunteer exempt mailings undertaken by the KSDCEC. During the field audit, the KSDCEC provided materials that demonstrated that it undertook these mailings through the substantial use of volunteers. In addition to photographs and sign in sheets, the KSDCEC provided sworn declarations from a volunteer, a KSDCEC staffer and mail house employee who witnessed volunteers during the mail production process.

Although the Audit Division appears to accept the provided documentation for a substantial portion of the mailing undertaken by the KSDCEC, it appears to reject, wholesale, without explanation, any of the provided documentation for 3 of 13 the mailings undertaken by the KSDCEC. This approach seems to contradict other audits that our office is aware of and pending before the Commission. For example, in the Draft Final Audit Report of the Connecticut Democratic State Central Committee, rather than concluding that the coordinated expenditure limit had been exceeded, the Audit Division acknowledges that the Commission had not previously provided sufficient guidance on the issue and requests that the Commission provide further guidance regarding the amount of documentation required without recommending a finding that the committee exceeded the coordinated expenditure limit. See Agenda Document 21-44-A for Open Meeting of December 16, 2021. During consideration of this report during the open meeting of December 16, 2021, there were sufficient votes by the Commission to determine that the state party had not exceeded the coordinated expenditure limit in connection with volunteer mailings based solely upon the declarations provided by the committee.

Although not acknowledged by the DFAR, **the declarations provided by the KSDCEC staffer and mail house employee were intended to cover all 13 mailings undertaken by the KSDCEC and not just those for which additional documentation were provided.** Of course, if the KSDCEC had located documentation for all 13 mailings, the declarations would have presumably been unnecessary.

Based upon the above, the DFAR's analysis was inconsistent with similarly situated Audits and the KSDCEC trusts that the Commission will treat this matter consistently with other Audits and enforcement matters and determine that the KSDCEC did not exceed the coordinated expenditure limit.

Finding #5

The Audit Report's fifth finding relates to a proposed finding that the KSDCEC did not report the distribution of certain campaign materials as independent expenditures. Based upon our response, the Audit Report determined that the communications subject to this finding were not independent expenditures.

Notwithstanding the Audit Division's conclusion, the origin of this finding and the circumspect and confusing analysis of the Draft report requires that this finding either be removed from the report or additional clarifying information be provided.

The apparent origin of this finding is believed to be an attempt by the Audit Division to address the purported lack of documentation provided for the use of volunteers for the distribution of exempt campaign materials which were handed out by volunteers, as documented by a sworn declaration provided by the then Executive Director of the KSDCEC. In an apparent attempt to create a finding that would result in a lesser penalty, the Audit Division chose to analyze this issue as a reporting matter and not one related to issue at hand, which is whether the distribution of these materials resulted in an excessive coordinated expenditure on behalf of the candidate.

As we discussed in our response to the IAR, this approach is confusing and unnecessary. In addition, the Office of General Counsel, in its memorandum attached to the IAR, agrees with our assertion that the activities undertaken by the KSDCEC were not "public communications" and there for could not result in a coordinated communication. See memorandum of the Office of the General Counsel, pp.4-7.

Based on the above, the Commission must either remove this finding from the report or incorporate the General Counsel's analysis related to "public communications" into the Final Audit Report and provide further clarification as to the reasons for inclusion of this finding in the report.

If you require any further information, or have any other questions, please call me at (202) 479-1111.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Reiff". The signature is fluid and cursive, with the first name "Neil" being more prominent than the last name "Reiff".

Neil Reiff
Counsel to the Kentucky State Democratic
Central Executive Committee