UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABSALOM F. JORDAN, JR.,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 91-2428 (NHJ)

MEMORANDUM OPINION

Plaintiff Absalom Jordan brings this action pursuant to 2 U.S.C. § 437g(a)(8)(A), appealing from the decision of defendant Federal Election Commission ("FEC") to dismiss his complaint against Handgun Control Inc. and its separate segregated fund, Handgun Control, Inc. -- Political Action Committee (collectively, "HCI"). Plaintiff claims that because members of HCI lack sufficient control over the organization, they are not "members" within the meaning of 2 U.S.C. § 441b(b)(4)(C) and therefore cannot be the subject of solicitations by HCI. Defendant argues that plaintiff is barred from raising these claims because he is "in privity" with the National Rifle Association ("NRA"), an organization that previously litigated and lost similar claims before the FEC. Defendant also argues that previous FEC decisions have already resolved the issues plaintiff seeks to raise, and that the FEC therefore need not revisit them. Both parties have filed dispositive motions.

BACKGROUND

The Federal Election Campaign Act of 1971 ("FECA") makes it "unlawful for . . . any corporation . . . to make a contribution or

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expenditure in connection with" certain federal elections. 2 U.S.C. § 441b(a). FECA also makes it unlawful "for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families." Id. § 441b(b)(4)(A). FECA contains an exception to this rule, however, for it does not prevent "a corporation without capital stock, or a separate segregated fund established by a . . . corporation without capital stock, from soliciting contributions to such a fund from members of such . . . corporation without capital stock." Id. § 441b(b)(4)(C).

From 1983 to 1992, the NRA filed several administrative complaints with the FEC arguing that HCI did not qualify as a membership organization under § 441b(b)(4)(C) and that HCI had therefore violated § 441b(b)(4) by soliciting political contributions from people who were not HCI members. The NRA's first administrative complaint resulted in a 1984 conciliation agreement that required HCI to pay a civil penalty and to amend the group's bylaws. The NRA's second administrative complaint alleged that HCI's amended bylaws still were inadequate to qualify it as a membership organization because they (1) failed to require that business of any sort be conducted at HCI's annual membership meeting and (2) failed to establish members' right to elect a director to the governing board because members could only vote for "someone who had been preselected by the Board" and because the board retained the "power to remove any director without cause," including the "preselected candidate chosen by the 'membership.'" The FEC dismissed the complaint in 1985, concluding that "HCI has

satisfactorily established rights of participation in the organization's affairs for those deemed members of the corporation." The NRA did not seek timely review of this dismissal.

The NRA's third administrative complaint repeated the same claims with respect to annual meetings and board member elections that the FEC had already rejected in the NRA's second complaint. After the FEC dismissed the complaint, the NRA pursued an appeal that eventually led to affirmance of the dismissal by the United States Court of Appeals for the District of Columbia Circuit. See National Rifle Ass'n v. Federal Election Comm'n, 854 F.2d 1330 (D.C. Cir. 1988). The NRA then filed a fourth complaint in which it modified its argument with respect to board member elections by arguing that HCI's bylaws were insufficient because they did not permit HCI members to elect "all, or even a majority of the directors." The FEC dismissed this complaint on the ground that it raised an issue which had been resolved in the NRA's previous actions. The NRA's appeal once again resulted in affirmance of the FEC's dismissal. See National Rifle Ass'n v. Federal Election Comm'n, No. 89-3011 (D.D.C. Feb. 27, 1992) (Johnson, J.), aff'd, 1993 WL 52591 (D.C. Cir. Feb. 25, 1993).

Meanwhile, in July 1990 plaintiff Absalom Jordan, a member of both the NRA and HCI, sued HCI in the Superior Court for the District of Columbia, arguing that HCI could not seek restrictions on possession of rifles and shotguns because its articles of incorporation stated that its purpose was to advocate "the control of handguns." In response to his suit, HCI amended its articles of incorporation to state that its purpose was to seek measures "for the prevention of gun violence." Then, on November 8, 1990, plaintiff filed an administrative complaint

with the FEC charging that HCI was not a membership organization because it had amended HCI's articles of incorporation without providing its members with any notice or opportunity to participate in the decision.[1] The administrative complaint also raised the same legal issue with respect to board member elections as the NRA's fourth complaint.[2] The FEC dismissed plaintiff's complaint, stating:

> This complaint presents a claim which is substantially similar to that which has been previously made against the same Respondents in four prior complaints; that HCI's bylaws do not provide members with sufficient rights of control in the governance of the organization to qualify it as a membership organization. The Commission has already determined what rights HCI must provide to its members for it to be in compliance with the Act, and the Commission has concluded that HCI's current bylaws satisfy those requirements. See [NRA's first, second, and third administrative complaints]. The issue raised in the instant matter has been conclusively resolved. This complaint amounts to another request that the Commission reconsider its prior decisions.

Administrative Record at 188. Plaintiff's appeal of this decision has resulted in the instant action.

DISCUSSION

A. Res Judicata Does Not Bar This Action

The FEC claims that the NRA has funded and controlled plaintiff's lawsuit, and that plaintiff therefore is "in privity" with the NRA. His complaint is time-barred, according to the FEC, because it amounts to nothing more than yet another appeal of the NRA's second

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1. Jordan and HCI stipulated to dismissal of the Superior Court action on January 29, 1991.

2. The parties agree that the two complaints raise the same legal issue with respect to the board elections. See Mem. in Support of Pl.'s Mot. Summ. J. at 7.

administrative complaint, which the NRA failed to appeal in 1985. However, even if the FEC's allegations of control are true, res judicata (also known as "claim preclusion") cannot apply here because a case involving different parties is, by definition, a different cause of action. See Montana v. United States, 440 U.S. 147, 154 (1979) ("[T]he cause of action which a nonparty has vicariously asserted differs by definition from that which he subsequently seeks to litigate in his own right.") The FEC correctly notes that "[u]nder res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Id. at 153. For res judicata purposes, however, the definition of "privity" does not encompass persons who controlled previous litigation, but instead applies to parties who already have a close relationship to a suit, such as those who acquire an interest in the subject matter of a suit after it is filed (e.g., successors to property) and those who sue on behalf of others (e.g., trustees and executors). Jack H. Friedenthal et al., Civil Procedure § 14.13, at 685-86 (2d ed. 1993). Because Jordan asserts the instant claim in his own right, this case does not involve the same "cause of action" as the NRA complaints and res judicata therefore does not apply.

B. Collateral Estoppel Does Not Bar This Action

Under the doctrine of collateral estoppel (also known as "issue preclusion"), "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana, 440 U.S. at 153. Furthermore, "[a]

person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." Restatement (Second) of Judgments § 39 (1982); see also Montana, 440 U.S. at 154. The FEC argues that the NRA has exercised a high degree of control over this litigation, and that plaintiff therefore should be estopped from reopening the same issues that the NRA has already litigated and lost. Specifically, the FEC claims that NRA Legislative Counsel Richard Gardiner (1) selected Jordan to be the plaintiff in this case, (2) personally recruited Stephen Halbrook to serve as counsel for him, (3) completely funded plaintiff's legal actions, (4) provided Halbrook with copies of pleadings previously filed by the NRA, (5) defined plaintiff's litigation strategy, (6) communicated more often with Halbrook than plaintiff himself did, and (7) exercised total control over the litigation by retaining the absolute right to cut off funding if the litigation proceeded in what Gardiner believed to be the "wrong direction."

The Restatement of Judgments has set forth the elements that a court should consider in determining whether one party has exercised sufficient control over another to be bound by the doctrine of collateral estoppel:

> To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review. Whether his involvement in the action is extensive enough to constitute control is a question of fact, to be resolved with reference to these criteria. It is sufficient that the choices were in the hands of counsel responsible to the controlling person; moreover, the requisite opportunity may exist even when it is shared with other persons. It is not

> sufficient, however, that the person merely contributed funds or advice in support of the party, supplied counsel to the party, or appeared as amicus curiae.

Restatement (Second) of Judgments § 39 cmt. c (1982). The FEC has not demonstrated that the NRA exercised control over the instant litigation to such a degree. The FEC has only managed to show that the NRA paid plaintiff's legal bills, provided copies of NRA pleadings to Halbrook and communicated with Halbrook regularly. See Exs. 45-49 to Def.'s Mot. Summ. J.; Dep. of Richard Gardiner at 120-21, 142-43.[3]

This showing does not establish privity because mere contributions of "funds or advice" cannot amount to control. Gardiner testified that when the NRA funds litigation it always requests attorneys to file draft briefs and regular status reports, and that the NRA's role is limited to reading the briefs, editing them, and offering suggestions and advice. Dep. of Richard Gardiner at 12-13, 24, 152-53. He also testified that the NRA maintains a brief bank for use in all the cases it funds, and that by providing Halbrook with copies of previous pleadings the NRA hoped to reduce the cost of this litigation by eliminating the need to "reinvent the wheel." Id. at 15, 121, 142-43. He noted that the NRA defers to the attorneys' judgment on tactical questions and recognizes that attorneys must act in their clients' best interests, even when those interests are contrary to the interests of the NRA. Id. at 30-32.

Nothing in the record indicates that the NRA possessed "effective choice as to the legal theories" to be advanced in this litigation. To

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3. Whether Gardiner "selected" Jordan to be the plaintiff in this case or "personally recruited" Halbrook is irrelevant to the question of control as defined by the Restatement.

the contrary, Gardiner testified that he believed Halbrook was very experienced, that he was "very confident" of Halbrook's abilities, and that for this reason he was likely to supervise Halbrook's activities even less than he might in other NRA-funded cases. Id. at 23-24, 36-37. Nor did the NRA possess "control over the opportunity to obtain review." Gardiner testified that the NRA would never had funded Jordan's appeal of the FEC's decision if Jordan had not himself first expressed an interest in pursuing an appeal. See id. at 132.

The FEC also argues that the NRA exercises control over this litigation because it retains the absolute right to cut off funding if the litigation proceeds in the "wrong direction." See id. at 29. The Court rejects this argument. In the first place, the Court notes that Gardiner could not recall a single instance when such a cutoff had occurred, and there is certainly no evidence that Gardiner ever threatened to cut off funding in this case. See id. at 29-30. Furthermore, even if the NRA were to decide to cut off funding to a case, it would still continue to pay the plaintiff's legal fees up to the agreed-upon maximum figure. See id. at 29. Most important, however, the FEC's argument is incorrect because the Restatement has established that a nonparty does not control litigation merely because it contributes funds or supplies counsel. Implicit in a nonparty's decision to provide counsel to a party is the assumption that the nonparty may later withdraw its support. Under the FEC's reasoning, however, these nonparties would be bound by collateral estoppel because their right to withdraw support would constitute control. This position conflicts with the Restatement and the Court therefore refuses to accept it. The FEC has therefore failed to show that the NRA is in

control of the instant litigation, and the Court accordingly rejects the FEC's argument that collateral estoppel prevents Jordan from proceeding with this case.

C. The FEC's Decision Was Not Contrary to Law

Under 2 U.S.C. § 437g(a)(8), "[a]ny party aggrieved" by the FEC's dismissal of a complaint may petition the United States District Court for the District of Columbia, which "may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law" and order the FEC to conform with the court's declaration. The FEC's decision is "contrary to law" if (1) the FEC dismissed the complaint as a result of an impermissible interpretation of the FECA, or (2) the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion. Orloski v. Federal Election Comm'n, 795 F.2d 156, 161 (D.C. Cir. 1986).

In determining whether an interpretation of the FECA is permissible, a court's task is

> not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981) (citations omitted). To determine whether the FEC's construction of a statute is "sufficiently reasonable" the court must

> examine the legislation itself, using traditional tools of statutory construction, to ascertain if its intent

> is clear. Clear congressional intent derived from the plain language or legislative history of the statute dictates [the] result. However, where "the statute and its history are silent or ambiguous with respect to a specific issue," the agency's construction, if reasonable, must ordinarily be honored.

Common Cause v. Federal Election Comm'n, 842 F.2d 436, 439 (D.C. Cir. 1988) (citations omitted) (quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)).

As explained above, the dispute in this case focuses upon the definition of a "membership organization" under 2 U.S.C. § 441b(b)(4)(C). The statute does not itself define the term. The Supreme Court, in discussing the legislative history of the statute, came to the conclusion that "some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under § 441b(b)(4)(C)," but observed that "[t]here may be more than one way under the statute to go about determining who are 'members' of a nonprofit corporation." Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 204, 211 (1982). The FEC defines a "member" as a person who is "currently satisfying the requirements for membership in a membership organization" and specifies that a person is not a "member" if the only membership requirement is contribution to a segregated fund, standing alone. 11 C.F.R. § 114.1(e) (1993). Following the Supreme Court's decision in National Right to Work Committee, FEC advisory opinions further refined this definition to include persons who "have (1) some right to participate in the governance of the organization and (2) an obligation to help sustain the organization through regular financial contributions of a predetermined amount." Solicitation of Non-Voting Members, 2 Fed.

Election. Camp. Fin. Guide (CCH) ¶ 5815, at 11,171 (1985) (No. AO 1985-11); see also Solicitation of Doctors, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5893, at 11,369 (1987) (No. AO 1987-13).

The FEC applied these standards to HCI in 1985 when it ruled on the NRA's second administrative complaint. The FEC observed:

> We note, first of all, that HCI has instituted by-laws establishing annual meetings for members and authorizing the nomination and election of a "Member-at-Large" of the Board by members of HCI. While a Nominating Committee screens such nominees to assure that only persons who ha[ve] demonstrated their support of HCI's principles become candidates, this procedure appears to satisfy the requirements of the [1984 conciliation] agreement. The Governing Board, to be sure, retains the power to remove Directors, but this clause applies equally to all Directors, and not solely to those elected at-large by the membership. Consequently, it appears that HCI has satisfactorily established rights of participation in the organization's affairs for those deemed members of the corporation.

Ex. 59 to Def.'s Mot. Summ. J. at 4-5. Plaintiff argues that this conclusion is incorrect because the Supreme Court, in National Right to Work Committee, observed that "members" of groups like HCI should be defined, "at least in part, by analogy to stockholders of business corporations and members of labor unions." 459 U.S. at 204. Plaintiff notes that stockholders and union members can remove their management if they disagree with its policies, whereas members of HCI cannot. Plaintiff therefore argues that HCI cannot be considered a membership organization until its members have "real power to vote for board members" just like stockholders in a private corporation. Plaintiff also argues that HCI cannot possibly be considered a membership organization so long as its board of directors has the power to change HCI's Articles of Incorporation without the consent of the membership.

Despite plaintiff's objections, the Court finds the FEC's interpretation of § 441b(b)(4)(C) to be permissible under Chevron. As noted above, the statute itself is silent on the definition of "membership" and the Supreme Court, after analyzing the legislative history of § 441b(b)(4)(C), concluded that "some relatively enduring and independently significant financial or organizational attachment is required to be a 'member'" within the meaning of the section. 459 U.S. at 204. The Court did not define the nature of this "attachment," and did not even require that the attachment involve member control over the organization. It merely specified that there must be "some" attachment between the organization and its members, and that this attachment must be "independent" of members' responses to the organization's mass solicitations. The Court certainly did not require that members be provided with the opportunity to seize total control of the organization, as plaintiff argues. Nevertheless, the FEC has interpreted National Right to Work Committee as requiring organizations to give their members "some right to participate in the governance of the organization" before soliciting them for contributions under § 441b(b)(4)(C). Neither the Supreme Court nor the legislative history of the statute dictate any other requirement. Nor has plaintiff presented any authority directly contradicting the FEC's conclusion that HCI's bylaws provide its members with "some" power to control HCI's affairs. In the absence of any such contradiction, the Court must conclude that the FEC's interpretation of the statute is permissible. See Chevron, 467 U.S. at 842-43; see also Common Cause, 842 F.2d at 448 (noting that deference to the FEC "is particularly appropriate" when the FEC is interpreting the FECA).

Having reached this conclusion, the Court need only determine whether the FEC's dismissal of plaintiff's administrative complaint was arbitrary and capricious. See Orloski, 795 F.2d at 161. The Court concludes that it was not. The FEC correctly noted in its opinion that a series of previous decisions had "conclusively resolved" the issues plaintiff raised. An agency's scrupulous adherence to precedent is hardly arbitrary. Cf. Association of Data Processing Serv. Orgs. v. Board of Governors of Fed. Reserve Sys., 745 F.2d 677, 683 (D.C. Cir. 1984) (noting that "abrupt and unexplained departure from agency precedent" amounts to arbitrary and capricious action). Plaintiff also argues that the FEC acted arbitrarily by refusing even to consider his argument that HCI is not a membership organization because its directors can change HCI's Articles of Incorporation without consulting its members. This refusal makes perfect sense, however, because the FEC has already determined that HCI provides its members with sufficient power to qualify HCI as a membership organization. Whether HCI decides to provide its members with some additional power -- such as the right to approve amendments to the Articles of Incorporation -- is therefore irrelevant.

For these reasons, the Court will deny plaintiff's motion for summary judgment and grant defendant's motion for summary judgment. An appropriate order will issue.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

Date: May 27, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABSALOM F. JORDAN, JR.,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No. 91-2428 (NHJ)

ORDER AND JUDGMENT

For the reasons set forth in the memorandum opinion issued today, it is this 27th day of May, 1994,

ORDERED that plaintiff's motion for summary judgment be, and hereby is, denied; it is further

ORDERED that defendant's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that judgment be, and hereby is, entered in favor of defendant Federal Election Commission.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

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