



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 04 2009

Stephen E. Hershkowitz, Esq.
Sandler, Reiff & Young P.C.
300 M St. SE
Suite 1102
Washington, DC 20003

RE: MUR 5833
Ohio Democratic Party
Dean DePiero, in his official
capacity as treasurer

Dear Mr. Hershkowitz:

On October 11, 2006, the Federal Election Commission (the "Commission") notified your client(s), the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, of a complaint alleging that your clients violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided your clients with a copy of the complaint.

After reviewing the allegations contained in the complaint, your clients' response, and publicly available information, the Commission on April 15, 2009, found reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, violated 2 U.S.C. §§ 441d, 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2) and 11 C.F.R. § 104.4(a) and (b)(2), provisions of the Act and the Commission's Regulations. However, the Commission found no reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and (f). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determinations.

Wanda D. Brown, the attorney assigned to this matter, at (202) 694-1650 or (800) 424-9530, within seven days of receipt of this letter. , please contact
you may submit any factual or

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legal materials that you believe are relevant to the resolution of this matter.

In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,



Steven T. Walther
Chairman

Enclosures

Factual and Legal Analysis

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BEFORE THE FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Ohio Democratic Party
and Dean DePiero, in his
official capacity as treasurer

MUR 5833

I. BACKGROUND

This matter was initiated by a signed, sworn, and notarized complaint by the Ohio Republican Party. The complainant in this matter alleges that the cost of an Ohio Democratic Party ("ODP") mailing featuring Democratic Senatorial candidate Sherrod Brown may have constituted an excessive contribution from the ODP to Friends of Sherrod Brown and Eileen Gallagher, in her official capacity as treasurer ("Brown Committee"). Further, the complainant alleges that the ODP failed to indicate on the mailing whether it was authorized by a candidate or candidate's committee, thereby violating the disclaimer requirements of the Federal Election Campaign Act of 1971, as amended ("the Act").

After review of the complaint, responses and other available information, the Federal Election Commission ("Commission") found reason to believe that the ODP violated 2 U.S.C. § 441d by failing to include with the mailing a proper disclaimer stating whether it was authorized by a candidate or a candidate committee. Further, the Commission found reason to believe that the ODP violated 2 U.S.C. §§ 441d, 434(b)(4)(H)(iii), (6)(B)(iii), and (g)(2) and 11 C.F.R. § 104.4(a) and (b)(2) by failing to properly disclose the cost of the mailing as an independent expenditure by the ODP on behalf of the Brown Committee. Finally, because the ODP made an independent expenditure on behalf of the Brown Committee rather than a coordinated expenditure, the Commission found no reason to believe that the ODP violated 2 U.S.C. § 441a(a)(2)(A) and (f) by making an in-kind expenditure to the Brown Committee.

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II. FACTUAL BACKGROUND

Before the 2006 general election, the ODP paid \$157,754 to create and disseminate a four-page mailing featuring two Democratic Party candidates, Ted Strickland (for Governor) and Sherrod Brown (for United States Senate). Complaint, Exhibit A; ODP Response at 1. The mailing encouraged individuals to “vote by mail” for these two candidates and to “turn around Ohio” and “fight . . . corruption in Columbus and Washington.” Complaint, Exhibit A at 2-3. It also featured photographs of George W. Bush and former Senator Mike DeWine, and stated that “you don’t have to wait until Election Day to send them a message.” *Id.* at 1. The mailing stated that Ted Strickland and Sherrod Brown would “put an end to corporate tax breaks that cost taxpayers millions and have left Ohio’s families with the third worst tax burden in the nation.” *Id.* at 3. It highlighted Sherrod Brown’s refusal “to accept the free health care benefits provided members of Congress until all Ohio families have access to adequate care” and argued that Strickland and Brown would “expand job growth by investing in entrepreneurship, innovation, and energy production” and that they would “provide access to world-class schools” to “challenge and prepare our children for the next-generation workforce.” *Id.* The mailing concluded with: “Ohio Democrats provide the change we need.” *Id.* at 4. A disclaimer in a printed box stated that the mailing was “Paid for by the Ohio Democratic Party,” and the ODP’s street address appeared as a return address above the box. *Id.* at 4. ODP disclosed the disbursement for the mailing on Schedule B of its 2006 Pre-General Report, filed with the Commission on October 24, 2006, and listed the purpose as “printing exempt slate card.”

The complainant alleges that, based on the ODP’s “fail[ure] to allocate and report” the cost of the mailing, the ODP “may have made an excessive contribution” to the Brown Committee. Further, the complainant alleges that the ODP may have attempted to fund the

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mailing under either the volunteer materials or slate card exemption, but asserts that the mailing did not qualify for either exemption because it was mailed by a commercial entity and did not list three or more candidates. Finally, the complainant alleges that the ODP violated the disclaimer requirements at 2 U.S.C. § 441d(a) because the mailing did not state whether it was authorized by any candidate or candidate committee.

In its response to the complaint, the ODP concedes that, because of miscommunication amongst its staff, the mailing at issue was handled by a direct mail company rather than by volunteers. The ODP also asserts that, “to the best of [its] knowledge,” Sherrod Brown’s campaign “had little or no participation in the creation or dissemination of this particular mail piece.”

III. LEGAL ANALYSIS

As an initial matter, the Commission must determine whether the volunteer activity exemption or slate card exemption apply to the circumstances of this matter. If the pamphlet qualified for the volunteer activity exemption, *see* 11 C.F.R. §§ 100.87 and 100.147, or the slate card exemption, *see* 11 C.F.R. §§ 100.80 and 100.140, the disclaimer on the pamphlet would not have had to state whether the pamphlet was authorized by any candidate, *see* 11 C.F.R. § 110.11(e), would have been properly reported, and the costs associated with it would not have constituted a contribution or an expenditure, and would not have been subject to contribution or coordinated expenditure limits, *see* 2 U.S.C. § 431(8)(B)(v), (x) and (9)(B)(iv), (viii). If the pamphlet did not qualify for either exemption, the disclaimer on the pamphlet would have had to state whether the pamphlet was authorized by any candidate, *see* 11 C.F.R. § 110.11(b), and depending on its content and whether it was coordinated with a candidate, the cost of the pamphlet might be considered and reported as an independent expenditure, a coordinated party

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expenditure, or an in-kind contribution, the latter two of which are subject to statutory limits.

2 U.S.C. §§ 441a(a)(2)(A) and 441a(d)(3).

A. The Pamphlet Is Not Exempt Activity

Pursuant to the Federal Election Campaign Act of 1971, as amended ("the Act"), the ODP was permitted to contribute \$5,000 directly to the Brown Committee for the 2006 election cycle. 2 U.S.C. § 441a(a)(2)(a) and (b). In addition, the ODP was permitted to make coordinated party expenditures in connection with the general election campaign of candidates for Federal office, pursuant to requirements and limitations of 2 U.S.C. § 441a(d). A contribution or expenditure is a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made for the purpose of influencing an election for Federal office. *See* 2 U.S.C. §§ 431(8)(A)(i) and 431(9)(A)(i); 11 C.F.R. §§ 100.52 and 100.111(a) (defining "contribution" and "expenditure"). The term "anything of value" includes in-kind contributions of goods and services. 11 C.F.R. § 100.52(d)(1). However, under the volunteer materials exemption, the payment by a state or local party committee of the costs of campaign materials used in connection with volunteer activities on behalf of any nominee of such party are not contributions or expenditures provided that, *inter alia*, the materials are distributed by volunteers and not by commercial or for-profit entities. 11 C.F.R. §§ 100.87 and 100.147. Similarly, under the slate card exemption, costs associated with the preparation, display, or mailing or other distributions of a printed slate card are not contributions or expenditures. 11 C.F.R. §§ 100.80 and 100.140. In order to qualify as a slate card, a communication must list three or more candidates for any public office for which an election is held in the state in which the committee is organized. *Id.*

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In this matter, it appears that the ODP pamphlet does not qualify for either exemption. The complainant asserts that the pamphlet bears a commercially-printed address label and postage and was not mailed by volunteers and thus did not qualify as volunteer activity. In fact, the ODP concedes that the pamphlet was supposed to have been mailed by volunteers, but was mistakenly mailed by a direct mail company. Further, it is apparent on the face of the pamphlet that it does not feature the requisite three candidates to qualify as a slate card. As a result, it appears that the pamphlet does not qualify as exempt activity.

B. Disclaimer Violation

Had the pamphlet qualified as exempt activity, the disclaimer on the pamphlet would not have had to state whether the pamphlet was authorized by any candidate. 11 C.F.R. § 110.11(e). However, because the pamphlet was not exempt activity, other disclaimer requirements apply. All mass mailings paid for by a political committee (as well as any other type of general public political advertising by a political committee), whether coordinated with a candidate and/or a candidate's committee, or not, must display a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1); *see* 11 C.F.R. § 100.27. If not authorized by a candidate or candidate committee, the disclaimer must state the full name and permanent street address, telephone number, or World Wide Web address of the entity that paid for the communication and that the communication is not authorized by any candidate or candidate's authorized committee. 2 U.S.C. § 441d(a)(3), 11 C.F.R. §§ 110.11(b)(3) and (d)(3). If authorized by a candidate or candidate committee, the disclaimer must identify the committee that made the expenditure and must state that the communication is authorized by the candidate or the candidate's authorized committee. 2 U.S.C. § 441d(a)(2), 11 C.F.R. § 110.11(d)(1) and (2).

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All disclaimers must appear in a printed box that is set apart from the other contents of the communication. 2 U.S.C. § 441d(c)(2), 11 C.F.R. § 110.11(c)(2)(ii).

The disclaimer at issue here stated only: "Paid for by the Ohio Democratic Party."

Thus, whether the pamphlet was authorized by Sherrod Brown or the Brown Committee, or not, the disclaimer failed to meet the applicable statutory and regulatory requirements for disclaimers. If not authorized by Sherrod Brown or the Brown Committee, it failed to meet the disclaimer requirement because it did not include within a printed box the street address, telephone number, or World Wide Web address of the ODP and did not state whether it was authorized by any candidate. If authorized by Sherrod Brown or the Brown Committee, it failed to meet the disclaimer requirement because it did not state that it was authorized by Sherrod Brown or his committee. Accordingly, the Commission found reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, violated the disclaimer requirements of 2 U.S.C. § 441d.

C. Excessive Contribution to the Brown Committee

The complainant in this matter alleges that the ODP made an excessive contribution based on its "fail[ure] to allocate" the cost of the mailing. As previously discussed, the ODP was permitted to make expenditures on behalf of the Brown Committee. However, the cost of creating and disseminating the mailing could potentially result in a coordinated party expenditure or an in-kind contribution if the ODP coordinated the mailing with the Brown Committee. See 11 C.F.R. § 109.37(b) (a payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party committee as either an in-kind contribution or a coordinated party expenditure). If the Brown Committee coordinated the mailing with ODP, the expenditure would be a coordinated party

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expenditure under the Act or an in-kind contribution. If, however, the mailing was not coordinated between ODP and Sherrod Brown or the Brown committee, and the mailing expressly advocates for the election or defeat of Sherrod Brown, a Federal candidate, the expenditure would be an independent expenditure by the ODP on behalf of the Brown Committee. 2 U.S.C. § 431(17).

The complainant in this matter makes no specific allegation of coordination, and presents no facts suggesting that the Brown Committee became materially involved in, made a request or suggestion or had substantial discussions with the ODP regarding the production or dissemination of the communication. 11 C.F.R. § 109.21(a). The Commission is also not aware of any publicly available information suggesting that the ODP and the Brown Committee coordinated to produce and disseminate the mailing. Absent information suggesting coordination, it is reasonable to infer that the disbursement related to the mailing was not a coordinated expenditure by the ODP on behalf of the Brown Committee, and therefore the cost of the mailing is not a contribution to the Brown Committee. Accordingly, the Commission found no reason to believe that the Ohio Democratic Party and Dean DePiero, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and (f).

D. Reporting Violation

Because the available information does not suggest that the communication was coordinated, the Commission examined whether the cost of the mailing was properly reported as a disbursement on Schedule B or whether it qualifies as an “independent expenditure.” Disbursements made for a communication result in an independent expenditure if the communication “expressly advocate[es] the election or defeat of a clearly identified candidate,” and is not made in cooperation or consultation with the candidate, the candidate’s authorized

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political committee, or their agents. 2 U.S.C. § 431(17)(A)–(B). The candidate is “clearly identified” when the name or photo of the candidate appears in the communication. 2 U.S.C. § 431(18)(A) and (B). The Act requires that independent expenditures by a political committee on behalf of a Federal candidate be disclosed as such in reports filed with the Commission. A political committee must report independent expenditures that exceed \$200 each, or those made on behalf of the same candidate that aggregate over \$200 during the calendar year on Schedule E of FEC Form 3X at the end of the first reporting period following the expenditure. 2 U.S.C. § 434(b)(4)(H)(iii) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a).

As previously explained, absent coordination, an expenditure made on behalf of a political committee, containing express advocacy, is an independent expenditure and should be reported as such. Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” See 11 C.F.R. § 100.22(a); see also *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 249 (1986) (“*MCFL*”) (“[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than “Vote for Smith” does not change its essential nature.”). The Commission’s regulations further provide that express advocacy includes communications containing an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable minds could not differ as to whether it encourages actions to elect

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or defeat” a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b).

Here, the mailing expressly advocates the election of Sherrod Brown when it urges voters to “Vote by Mail to Turn around Ohio” and identifies and provides photographs of Strickland and Brown as candidates who will “turn around Ohio.” Thus, the communication “provides in effect an explicit directive: vote for these (named) candidates.” *MCFL* at 249 (holding that a communication contained express advocacy where “The publication not only urges voters to vote for “pro-life” candidates, but also identifies and provides photographs of specific candidates fitting that description”). It also appears that this advertisement contains express advocacy within the meaning of 11 C.F.R. § 100.22(b) because reasonable minds could not differ as to whether the ad encourages actions to elect or defeat a candidate” when taken as a whole and with limited reference to external events, such as the proximity to the election.

Accordingly, the mailing appears to be an independent expenditure by the ODP on behalf of the Brown Committee and should have been reported on Schedule E itemizing the cost of the communication as an independent expenditure, rather than as a disbursement on Schedule B.

Further, the ODP failed to file the required initial 48-hour notice of an independent expenditure. A political committee that makes independent expenditures “aggregating \$10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.” 2 U.S.C. § 434(g)(2)(A); *see* 11 C.F.R. § 104.4(b)(2). Each 48-hour report must contain information indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved.

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2 U.S.C. § 434(b)(4)(H)(iii). ODP's independent expenditure for the communication exceeded \$10,000 and was made in early October, over 20 days from the election, and therefore was required to be reported on a 48-hour notice.

Accordingly, the Commission found reason to believe that the Committee violated 2 U.S.C. § 434(b)(4)(H)(iii), (6)(B)(iii), and 11 C.F.R. § 104.4(a) by failing to disclose an independent expenditure totaling \$157,754 on Schedule E, and 2 U.S.C. § 434(g)(2) and 11 C.F.R. § 104.4(b)(2) by failing to file a 48 Hour Notice relating to the same independent expenditure.

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