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999 E Street, NW
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2011 SEP 13 PM 4: 47

FIRST GENERAL COUNSEL'S REPORT

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DATE RECEIVED: October 28, 2010

DATE ACTIVATED: June 15, 2011

EARLIEST SOL: June 15, 2015

LATEST SOL: October 24, 2015

COMPLAINANT:

Lois Herr

RESPONDENTS:

Republican Committee of Chester County
Friends of Joe Pitts and Duer A. Pierce, Jr., in his
official capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 433

2 U.S.C. § 434

2 U.S.C. § 441d

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter stems from allegations that the Republican Committee of Chester County ("RCCC") made expenditures on behalf of, or contributions to, Friends of Joe Pitts and Duer A. Pierce, in his official capacity as treasurer, ("Pitts Committee") in connection with the production and distribution of fifteen short videos that were posted on the internet. The videos in question allegedly criticized the complainant, Lois Herr, Mr. Pitts' Democratic opponent in the 2010 general election in Pennsylvania's 16th Congressional District. The complainant alleges that the RCCC violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee; violated 2 U.S.C. § 434 by failing to report the cost of the videos as either independent expenditures or in-kind contributions; and violated 2 U.S.C. § 441d by failing to

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1 include proper disclaimers on the videos. Finally, the complainant alleges that the Pitts
2 Committee violated 2 U.S.C. § 434 by failing to report the videos as in-kind contributions.

3 The RCCC asserts that the videos were produced by an individual volunteer without the
4 use of RCCC's resources, and therefore fall within the exemption related to internet activity by
5 individuals. See 11 C.F.R. §§ 100.94 and 100.122. The RCCC maintains that it incurred only
6 \$300 in expenses related to the videos, which can be attributed to the cost of hosting the website
7 on which the videos were posted; that is, the RCCC did not pay to post the videos on any other
8 site. Accordingly, the RCCC maintains that it was not required to register or report as a political
9 committee. The RCCC, however, acknowledges that the videos may not have included complete
10 disclaimers.

11 The Pitts Committee denies ever receiving notification that a possible in-kind
12 contribution had been made, and therefore contends that it had no reason to report any such
13 in-kind contribution.

14 As set forth below, we recommend the Commission find no reason to believe that the
15 RCCC violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political
16 committee. Additionally, to the extent that the RCCC's cost to post videos that contained
17 express advocacy could have constituted a reportable independent expenditure, we recommend
18 the Commission exercise its prosecutorial discretion and dismiss any violation of 2 U.S.C. § 434
19 by the RCCC. We also recommend the Commission find no reason to believe that the RCCC
20 violated 2 U.S.C. § 441d by failing to include complete disclaimers on the videos. Finally, we
21 recommend the Commission find no reason to believe that the Pitts Committee violated 2 U.S.C.
22 § 434(b) by failing to disclose the videos as in-kind contributions.

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II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The Republican Committee of Chester County is not currently registered as a political committee with the Commission. The RCCC was once registered as an unauthorized qualified party committee, but the Commission accepted its termination report on October 11, 1999, and it has not registered or reported with the Commission since that date. According to its bylaws, the RCCC is "responsible for the general supervision, regulation, and direction of the Republican Party of Chester County." See Bylaws for the Republican Committee of Chester County Rule 2.1. Additionally, the Republican Party of Pennsylvania website lists the RCCC as its "headquarters" contact in Chester County. See "Chester County: Republican Party of Pennsylvania," <http://www.pagop.org/counties/chester-county/> (last visited August 29, 2011).

Congressman Joe Pitts was first elected to the U.S. House of Representatives from Pennsylvania's 16th Congressional District in 1996, and is currently serving his eighth term. Friends of Joe Pitts and Duer A. Pierce, in his official capacity as treasurer, is his authorized principal campaign committee.

In the four months leading up to the 2010 general election, in which Congressman Pitts ran against Democratic challenger Lois Herr, the RCCC posted a series of fifteen short videos on its YouTube channel and the website www.leftwinglois.com. The complaint does not include either transcripts or copies of the videos. According to a local media report, the videos "mock" Ms. Herr's positions on health care and abortion rights. See Tom Murse, *Herr Files Complaint with Federal Election Commission*, Lancaster Online, Oct. 27, 2010, http://lancasteronline.com/article/local/305547_Herr-files-complaint-with-Federal-Election-Commission.html. Although the October 2010 complaint includes the web address for each video, it appears that the videos were removed from the RCCC's YouTube channel and the

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www.leftwinglois.com website was deactivated sometime after the November 2010 election. We were unable to find a cached or archived version of the videos online. The following table contains the information available regarding the videos:

Table 1. RCCC Videos

Date Posted	Title	Length
7/15/10	"Rules for Radicals"	1:34
7/23/10	"Howard Dean"	1:35
7/25/10	"How Liberal is Lois?"	1:10
8/3/10	"Barney Frank Healthcare"	2:37
8/14/10	"Breaking the Rules"	1:40
8/22/10	"The Cruise, Part 1"	2:02
8/22/10	"The Cruise, Part 2"	2:25
8/29/10	"Government-Funded Abortion"	1:24
9/8/10	"Marijuana"	1:25
9/8/10	"ACORN"	1:44
9/8/10	"The Earmarks Flip-Flop"	1:36
9/19/10	"Left of Obama"	2:20
10/11/10	"Left of Pelosi"	2:03
10/12/10	"No Plan for Jobs"	1:45
10/24/10	"The Candidate Who Cried Wolf"	1:34

Complainant asserts that the videos "targeted" Ms. Herr, and were produced for the purpose of influencing voters in a federal election to the benefit of the Pitts Committee. Complaint at 1. Accordingly, Complainant alleges that the RCCC violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee, and also violated 2 U.S.C. § 434 by failing to report the expenditures associated with these videos. Additionally, while each video contains a disclaimer stating that it is, "Paid for by the Republican Committee of Chester County," Complainant alleges that this is an incomplete disclaimer in violation of 2 U.S.C. § 441d. Finally, Complainant alleges that the Pitts Committee violated 2 U.S.C. § 434(b) by failing to report the videos as in-kind contributions.

The RCCC does not deny the basic facts set forth in the complaint, but denies any liability related to registering and reporting with the Commission. The RCCC asserts that it did

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1 not pay to produce the videos, but instead the videos were produced by a volunteer, and therefore
2 fall within the "volunteer activity on the internet exemption." RCCC Response at 1. The RCCC
3 states that it only incurred a \$300 expense for hosting the website on which the videos were
4 displayed. *Id.* Accordingly, the RCCC maintains that it was not required to register with or
5 report to the Commission. *Id.* Finally, the RCCC acknowledges that its videos may have
6 included incomplete disclaimers and states that it will inform future volunteers of disclosure
7 requirements. *Id.*

8 The Pitts Committee denies that it failed to file any disclosure reports required by law.
9 Pitts Response at 1. It asserts that it never received notification that an in-kind contribution had
10 been made, and therefore had no reason to report any such in-kind contribution. *Id.*

11 B. Legal Analysis

12 1. Political Committee Status

13 Under the Federal Election Campaign Act of 1971, as amended, ("the Act"), a political
14 committee is any committee, club, association, or other group of persons which receives
15 contributions or makes expenditures aggregating in excess of \$1,000 during a calendar year.
16 2 U.S.C. § 431(4)(A). Commission regulations define "local committee" as any organization
17 that by virtue of the bylaws of a political party or the operation of State law is part of the official
18 party structure, and is responsible for the day-to-day operation of the political party at the level
19 of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State.
20 11 C.F.R. § 100.14(b). A local committee of a political party also qualifies as a political
21 committee if it: (1) makes contributions or expenditures aggregating in excess of \$1,000 in a
22 calendar year; (2) receives contributions aggregating in excess of \$5,000 during a calendar year;
23 or (3) makes payments for activity exempted from the definitions of contribution and
24 expenditure aggregating in excess of \$5,000 during a calendar year. 2 U.S.C. § 431(4)(C).

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1 The RCCC appears to qualify as a "local committee" under Commission regulations
2 because it is responsible for the day-to-day operation of the Republican Party within Chester
3 County, and the Republican Party of Pennsylvania appears to recognize it as part of the State
4 party structure. *See supra* at 3. There is no information, however, to indicate that the RCCC
5 meets the \$1,000 financial threshold for expenditures required to trigger political committee
6 status under the Act. *See* 2 U.S.C. § 431(4)(C).

7 Under the Act, the value of services provided without compensation by any individual
8 who volunteers on behalf of a candidate or political committee is specifically exempted from the
9 definition of contribution. 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.74. Additionally, the use of
10 an individual's real or personal property, when provided in the course of volunteering personal
11 services on his or her residential premises, is excluded from the definitions of contribution and
12 expenditure. 11 C.F.R. §§ 100.75 and 100.135. Commission regulations further provide that an
13 individual's or group of individuals' uncompensated internet activity for the purpose of
14 influencing a Federal election – whether undertaken independently or in coordination with any
15 candidate, authorized committee, or political party committee – is exempted from the definitions
16 of contribution and expenditure. 11 C.F.R. §§ 100.94 and 100.155. These regulations
17 specifically exempt the value of an individual's uncompensated time and the value of any special
18 skills that individual may bring to bear on their internet activities, as well as his use of equipment
19 and services for uncompensated internet activity, regardless of who owns such equipment or
20 where it is located. *Id.* *See also* Explanation and Justification for Internet Communications,
21 71 Fed. Reg. 18589, 18604-05 (April 12, 2006). The regulations define "internet activity" to
22 include a non-exhaustive list of potential activity, as well as "any other form of communication
23 distributed over the internet." *Id.*

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1 Based on the RCCC's assertion that it did not pay for the videos, but that they were
2 instead produced by an individual volunteer using his/her own resources, it appears that the
3 production of the videos constitutes "uncompensated volunteer services" specifically exempted
4 from the definitions of contribution and expenditure. *See supra* p. 6. Thus, the provision of the
5 videos to the RCCC did not constitute a contribution, and the unknown cost of the videos'
6 production does not cause the RCCC to have made expenditures that result in triggering political
7 committee status. Further, to the extent that the volunteer had a role in posting the videos on the
8 website, it would similarly be "uncompensated internet activity," as asserted by the RCCC.

9 Based on the information provided in the complaint and the responses, the only activity
10 that could count towards the relevant financial thresholds for triggering political committee
11 status would be the RCCC's payment to host the website on which videos containing express
12 advocacy were posted. Regardless of whether some or all of the videos contain express
13 advocacy, this \$300 payment falls short of the financial thresholds that would trigger political
14 committee status. *See* 2 U.S.C. § 431(4)(C). Thus, it does not appear that the RCCC was
15 required to register and report as a political committee under the Act. Accordingly, we
16 recommend the Commission find no reason to believe that the Republican Committee of Chester
17 County violated 2 U.S.C. §§ 433 and 434.

18 2. Independent Expenditure Reporting

19 Under the Act, every person other than a political committee who makes an independent
20 expenditure in an aggregate amount or value in excess of \$250 during a calendar year shall file a
21 statement or report with the Commission containing certain information about that expenditure.
22 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10. An "independent expenditure" is an expenditure by a
23 person expressly advocating the election or defeat of a clearly identified federal candidate that is

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1 not made in concert or cooperation with the candidate, the candidate's committee, a political
2 party committee, or any of their agents. 2 U.S.C. § 431(17).

3 Although the RCCC expended \$300 to host the website on which the videos were posted,
4 neither the complaint nor the responses include any substantial information as to the content of
5 the videos. While the titles of the video and the name of the website on which they were posted
6 (www.leftwinglois.com) indicate that they may have "targeted" Lois Herr, as the complainant
7 alleges, a determination as to which videos, if any, actually constituted independent expenditures
8 would require an investigation. Given that the RCCC spent only \$300 in connection with the
9 website, it does not appear that the use of Commission resources to conduct an investigation is
10 warranted. Accordingly, we recommend the Commission exercise its prosecutorial discretion
11 and dismiss any potential violation of 2 U.S.C. § 434(b) by the Republican Committee of Chester
12 County. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

13 3. Disclaimer Requirements

14 The Act, as implemented through Commission regulations, requires that all public
15 communications by any person that expressly advocate the election or defeat of a clearly
16 identified candidate include disclaimers. 11 C.F.R. § 110.11(a)(2). Commission regulations
17 define "public communication" to exclude all communications over the internet, except for
18 communications placed for a fee on another person's website. 11 C.F.R. § 100.26.

19 Regardless of the content of the videos, it does not appear that they qualify as "public
20 communications." The videos were displayed on two websites: (1) the RCCC's YouTube
21 channel; and (2) the website www.leftwinglois.com, which the RCCC hosted at a cost of \$300.
22 There is no information indicating that the RCCC paid a fee to place the videos on another
23 person's website. It does not appear, then, that the videos required disclaimers. Accordingly, we

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1 recommend the Commission find no reason to believe that the Republican Party of Chester
2 County violated 2 U.S.C. § 441d.

3 4. In-Kind Contribution Reporting

4 A contribution is any gift, subscription, loan, advance, or anything of value made by any
5 person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(8)(a)(1).
6 Commission regulations define "anything of value" to include in-kind contributions: the
7 provision of goods or services without charge or at a charge that is less than the usual and normal
8 charge. 11 C.F.R. § 100.52(d)(1).

9 As discussed above, it appears that the production of the videos constitutes
10 "uncompensated volunteer services," or possibly "uncompensated internet activity," specifically
11 exempted from the definitions of contribution and expenditure under the Act. The complaint
12 alleges that the videos should have been reported as an in-kind contribution. The complaint
13 alleges no specific facts supporting an allegation of coordination, however, the cost of hosting
14 the videos on the RCCC's website would constitute an in-kind contribution if any of the
15 communications were coordinated with the Pitts Committee.

16 A candidate or authorized committee is required to report the usual and normal value of a
17 coordinated communication as an in-kind contribution. 11 C.F.R. § 109.21(b)(3). A
18 communication is coordinated with a candidate or his authorized committee when it is paid for
19 by a person other than the candidate or authorized committee, satisfies one of the content
20 standards at 11 C.F.R. § 109.21(c),¹ and satisfies one of the conduct standards at 11 C.F.R.

¹ There are five types of content that satisfy the content standard: (1) an electioneering communication; (2) a public communication that disseminates, distributes, or republishes campaign materials prepared by a candidate or his authorized committee; (3) a public communication expressly advocating the election or defeat of a clearly identified Federal candidate; (4) a public communication that refers to a clearly identified Federal candidate that is distributed in that jurisdiction within either 90 or 120 days of an election; and (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c).

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1 § 109.21(d).² 11 C.F.R. § 109.21(a). Furthermore, any expenditure that is made in cooperation,
2 consultation or concert with, or at the request or suggestion of, a candidate or his authorized
3 committee, but that is not made for a coordinated communication under 11 C.F.R. § 109.21, is an
4 in-kind contribution to the candidate committee with whom it was coordinated. 11 C.F.R.
5 § 109.20(b).

6 Based on the information presented in the complaint and the responses, it does not appear
7 that there was any conduct that would trigger coordination under either 11 C.F.R. §§ 109.20 or
8 109.21. In its response, the Pitts Committee asserts that it never received notification from the
9 RCCC that an in-kind contribution had been made, suggesting that it was unaware of the
10 communications. See Pitts Response at 1. There is no information contrary to this assertion.
11 Accordingly, we recommend that the Commission find no reason to believe that Friends of Joe
12 Pitts and Duer A. Pierce, Jr., in his official capacity as treasurer, violated 2 U.S.C. § 434(b) by
13 failing to report the cost of the videos as an in-kind contribution.

14 **III. RECOMMENDATIONS**

- 15 1. Find no reason to believe that the Republican Committee of Chester County violated
16 2 U.S.C. § 433.
17
18 2. Dismiss, as a matter of prosecutorial discretion, any violation of 2 U.S.C. § 434 by
19 the Republican Committee of Chester County.
20
21 3. Find no reason to believe that the Republican Committee of Chester County violated
22 2 U.S.C. § 441d.
23
24 4. Find no reason to believe that Friends of Joe Pitts and Duer A. Pierce, in his official
25 capacity as treasurer, violated 2 U.S.C. § 434(b).
26
27 5. Approve the attached Factual and Legal Analyses.
28
29 6. Approve the appropriate letters.
30

² There are five types of conduct that satisfy the conduct standard: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; and (5) former employee or independent contractor. 11 C.F.R. § 109.21(d).

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7. Close the file.

9-13-11
Date

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