

2013 MAY 15 PM 4:24

In the Matter Of

MUR 6600

DEAN HELLER

HELLER FOR SENATE AND

CHRISSIE HASTIE AS TREASURER

DISMISSAL AND CASE CLOSURE UNDER THE ENFORCEMENT PRIORITY SYSTEM

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Federal Election Commission (the "Commission") uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include without limitation an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and developments of the law. It is the Commission's policy that pursuing relatively low rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances.

The Office of General Counsel ("OGC") has determined that MUR 6600 should not be referred to the Alternative Dispute Resolution Office. Also, for the reasons set forth below, OGC recommends that the Commission exercise its prosecutorial discretion to dismiss MUR 6600.¹

In this matter, the Complainant, Roberta Lange, Chair of the Nevada State Democratic Party, alleges that Dean Heller, and Heller for Senate and Chrissie Hastie in her official capacity

13044340285

1 as treasurer (the "Committee"), began to air a broadcast television advertisement ("ad") on or
2 about June 17, 2012, that did not include a proper disclaimer consistent with the "stand by your
3 ad" requirements of the Act.² Compl. at 1. Specifically, the sworn Complaint alleges that the ad
4 failed to include a written disclaimer clearly stating that Heller had approved the communication.
5 See 2 U.S.C. § 441d(d)(1)(B)(iii); 11 C.F.R. § 110.11(c)(3)(iii). *Id.* at 1-2. The Complaint
6 acknowledges that a written disclaimer at the conclusion of the ad states "Paid for by: Heller for
7 Senate," but alleges that no written statement appears identifying the candidate or noting that
8 Heller approved the communication. *Id.* at 1.

9 The Respondents acknowledge that the ad in question did not include an appropriate
10 written approval statement. Resp. at 2. Respondents assert, however, that the ad complied with
11 two of the three disclaimer requirements for television advertisements as described in 11 C.F.R.
12 § 110.11(c)(3): 1) the ad "must state that it was paid for by the candidate's campaign;" and 2)
13 the ad "must contain the voice of the candidate, accompanied by a picture of the candidate,
14 stating that he or she approved the advertisement." *Id.* at 1. Respondents also state that there
15 could be no confusion that the ad was approved by Heller, as the candidate's name, website
16 address, Facebook page, and Twitter accounts were each displayed in writing multiple times
17 during the advertisement. *Id.* at 1-2. Additionally, Respondents state that the entire
18 advertisement consists of video of the candidate speaking directly to the camera. *Id.* at 2.

19 The Respondents note that the ad in question was replaced with a newer version of the
20 advertisement with the correct disclaimer less than 24 hours after Committee staff learned of the
21 error. Resp. at 2. Respondents also state that the Committee instituted new processes and

² The Complainant provides a link to the ad at issue: http://www.youtube.com/watch?v=AML_6XYNLKA, but attempting to visit the link results in an error message indicating that "this video is unavailable."

1 procedures for approval of advertisements, including having them reviewed by legal counsel
2 prior to distribution to ensure compliance with Commission regulations. *Id.*

3 The Act requires that whenever a public communication is authorized and financed by a
4 candidate or his or her committee, the communication must include a disclaimer notice that
5 clearly states the communication has been paid for by the authorized political committee.
6 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(b)(1). Furthermore, under the Act's "stand by your
7 ad" provisions,³ a television communication paid for or authorized by a candidate's principal
8 campaign committee must include an oral statement by the candidate that identifies the candidate
9 and states that the candidate approved the communication. 2 U.S.C. § 441d(d)(1)(B); 11 C.F.R.
10 § 110.11(c)(3)(ii). A "similar" statement must also appear in writing at the end of the
11 communication in a clearly readable manner with a reasonable degree of color contrast between
12 the background and the printed statement, for a period of at least four seconds. 2 U.S.C.
13 § 441d(d)(1)(B)(ii); 11 C.F.R. § 110.11(c)(3)(iii). The Commission has determined that
14 television advertisements, which only include a written statement that it was paid for by the
15 committee and a verbal statement of approval by the candidate and do not include a written
16 statement of the candidate's approval, do not meet the "stand by your ad" requirements. *See*
17 MUR 6565 (Blake for Congress) (the Commission concluded that a written statement of
18 approval by the candidate was required on television campaign advertisements); *see also* MUR
19 6070 (Lyle Larson); MUR 5834 (Darcy Burner); MUR 5629 (Newberry).

20 Although the ad did not contain the required disclaimers as required under
21 2 U.S.C. § 441d(d)(1)(B) and 11 C.F.R. § 110.11(c)(3)(iii), this matter does not warrant

³ This is "colloquially known as a 'stand by your ad' requirement because it directly associates the candidate with the message he or she has authorized." Advisory Op. 2004-10 (Metro Networks).

1 the further use of Commission resources.⁴ Here, based on the information supplied in the
2 Complaint and Response, it appears that the advertisement contained sufficient information to
3 clearly identify who paid for it, as well as an adequate spoken message of approval by the
4 candidate. In prior matters involving missing written candidate approval statements where the
5 communications otherwise appear to have contained sufficient identifying information to
6 prevent the public from being misled as to who paid for them, the Commission has dismissed
7 the matters as an exercise of prosecutorial discretion. *See* MUR 6565 (Blaha for Congress)
8 (the Commission exercised prosecutorial discretion and dismissed when candidate failed to
9 include a written statement of approval in a televised commercial but included a verbal
10 statement of approval and written statement of who paid); *see also* MUR 5834 (Darcy Burner);
11 *but see* MUR 5629 (Newberry) (the Commission found reason to believe but took no further
12 action).

13 In this case, the public was unlikely to have been misled as to whether Heller approved
14 the message because the advertisement consisted of the candidate speaking directly to the camera
15 and concluded with a verbal disclaimer that the ad was paid for by the Committee. Moreover, it
16 appears that the Respondents took quick remedial action once the omission was discovered and
17 instituted measures to ensure future compliance in this area. Therefore, in furtherance of the
18 Commission's priorities, relative to other matters pending on the Enforcement docket, the Office

⁴ The Complainant alleges that the ad without proper disclaimers began to air on June 17, 2012, and the Committee asserts that it was replaced with a version of the advertisement with the correct disclaimer less than 24 hours after the Committee's staff learned of the error. The Committee's July Quarterly Report, filed on July 17, 2012, shows that the Committee made four disbursements totaling \$268,561.35 for "Media" during the relevant period: one to Autumn Productions for \$5,419.35 on June 4, 2012; and three to Strategic Media Services Inc., \$27,265 on June 13, 2012, \$130,283 on June 15, 2012, and \$105,594 on June 21, 2012. The Committee's total disbursements for the reporting period were \$386,306.50. There is no available information that points to the amount that was spent on the ad in question. The Heller for Senate YouTube channel, located at <http://www.youtube.com/DeanHeller>, contains only one advertisement that was published during the July Quarterly reporting period. This advertisement, "Job (Dean Heller TV Ad)," is dated June 21, 2012, and can be viewed at <http://www.youtube.com/watch?v=h6LYuD6RfTQ>.

13044340288

of General Counsel believes the Commission should exercise its prosecutorial discretion and dismiss this matter pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), approve the attached Factual & Legal Analysis and the appropriate letters, and close the file.

RECOMMENDATIONS

1. Dismiss MUR 6600, pursuant to the Commission's prosecutorial discretion;
2. Approve the attached Factual & Legal Analysis and the appropriate letters; and
3. Close the file.

5/8/13
Date

Anthony Herman
General Counsel

BY:

Gregory R. Baker
Deputy General Counsel

Jeff. S. Jordan
Supervisory Attorney
Complaints Examination
& Legal Administration

Donald E. Campbell
Attorney
Complaints Examination
& Legal Administration

13044340289