

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6554

DATE COMPLAINT FILED: April 11, 2012

DATE OF NOTIFICATION: April 18, 2012

DATE OF LAST RESPONSE: May 31, 2012

DATE ACTIVATED: July 17, 2012

ELECTION CYCLES: 2000-2012

STATUTE OF LIMITATIONS: July 15, 2017

COMPLAINANT:

Whitney Wyatt Burns

RESPONDENTS:

Friends of Weiner and Nelson Braff in his
official capacity as treasurer

RELEVANT STATUTES:

2 U.S.C. § 434(b)(8)

2 U.S.C. § 441a(a)

11 C.F.R. § 104.3(d)

11 C.F.R. § 104.11(a)

11 C.F.R. § 116.1(d)

11 C.F.R. § 116.10(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Complainant, Whitney Burns, alleges that Friends of Weiner and Nelson Braff in his official capacity as treasurer ("Committee" or "Friends of Weiner"), principal campaign committee of Representative Anthony D. Weiner, violated the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations by failing to report over \$68,000 in outstanding debts owed to her for compliance services she provided to the Committee from 2001 to 2009.¹ Compl. at 1 (Apr. 10, 2012). The Committee contends it does not owe any payments

¹ On June 16, 2011, Weiner resigned from Congress and ended his candidacy for the 2012 primary election.

1 to Burns, and therefore it did not fail to report any debts to Burns in its disclosure reports. Resp.
2 at 1 (May 31, 2012).

3 For reasons discussed below, we recommend that the Commission dismiss, as a matter of
4 prosecutorial discretion, the allegations that Friends of Weiner and Nelson Braff in his official
5 capacity as treasurer violated 2 U.S.C. § 434(b)(8) by failing to report outstanding debts and
6 obligations, and close the file.

7 **II. FACTUAL BACKGROUND**

8 Friends of Weiner was the subject of Commission audits for the 2000 and 2004 election
9 cycles. Burns alleges in the Complaint that the Committee owes her over \$68,000 for
10 compliance services she provided to the Committee for these audits, and that the Committee has
11 failed to disclose this debt to the Commission. For the 2000 election cycle audit, Burns claims
12 that Friends of Weiner owes her \$15,258.75 for 404.5 hours of compliance services she provided
13 from 2001 to 2003. Compl. at 1-2. In support of her claim, Burns provided a one-page invoice,
14 dated September 2, 2003, billing the Committee for services allegedly provided from 2001 to
15 2003 (the invoice claims 234.75 hours, not 404.50, for a total of \$15,258.75). *Id.*, Ex. 1. The
16 invoice is billed to "Friends of Weiner" but shows no Committee address or contact person. *Id.*
17 For the 2004 election cycle audit, Burns claims that Friends of Weiner owes her \$53,077.50 for
18 529.5 hours of services she provided from 2005 to 2009. *Id.* at 2-3. Burns provided a second
19 invoice, dated August 21, 2009, which is identical in form to the first invoice. *Id.*, Ex. 3.
20 Complainant provided no proof of contemporaneous mailing for either invoice.²

² The Commission's Audit Division provided information and documents to the Office of General Counsel ("OGC") regarding Burns's involvement with the 2004 Friends of Weiner audit. The Audit Division noted that Burns and an attorney from the law firm of Perkins Coie, worked together on the 2004 audit.

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1 Burns asserts that she never received any payments for these services despite making
2 repeated attempts "over the years" to collect the debt, including having multiple conversations
3 with Friends of Weiner staff about the debt. *Id.* at 4. On June 17, 2011, Burns sent a certified
4 letter to the Committee treasurer with copies of the invoices requesting payment.³ *Id.* at 3, Ex. 4.
5 In the letter, Burns states she had difficulty billing Friends of Weiner and obtaining a
6 commitment on a payment schedule due to multiple staff changes and "the fact that the audits
7 were not a popular subject with the Congressman's senior staff, or the Congressman himself."
8 *Id.* The letter also states that Burns agreed to provide services for the 2004 audit on the
9 condition that she would be paid for the services rendered for the 2000 audit, but that she never
10 received any payments. *Id.* Finally, Burns notes in the letter that the Friends of Weiner's
11 disclosure reports show that it "appears to have sufficient funds" to pay her, but that her
12 "invoices have not been listed as a debt owed to the vendor." *Id.* Burns also asserts in the
13 Complaint that she notified the Committee of the outstanding debt again on January 27, 2012,
14 when she contacted the person who prepared the Committee's 2011 Year-End Report. *Id.* at 3.
15 The Committee's disclosure reports do not reflect any disbursements to or any debt owed to
16 Burns.

17 Burns alleges that Friends of Weiner's failure to disclose these debts violated 2 U.S.C.
18 § 434(b)(8), 11 C.F.R. §§ 104.3(d) and 104.11(a). *Id.* at 1. Burns further alleges that even if the
19 Committee disputes the debt, its failure to report it is still a violation of 11 C.F.R. § 116.10(a).
20 *Id.*

³ Burns sent her June 17, 2011, letter the day after Weiner resigned from Congress. Friends of Weiner claims that this timing shows that Burns's Complaint is "nothing more than a strike suit." Resp. at 2. Burns states that she hesitated in filing a complaint with the Commission or suing the campaign while Weiner was in Congress because of concerns that taking such actions would damage her business. Compl. at 4.

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1 In response, Friends of Weiner argues that it has not violated the Act or Commission
2 regulations and requests that the Commission dismiss the matter. Resp. at 1. The Committee
3 asserts that it does not owe any debt to Burns because it never had a contract with her, did not
4 hire her, and never directed or supervised her. Resp. at 2. Friends of Weiner also asserts that, to
5 the extent she performed services for the Committee "she did so at the request and under the
6 direction of a law firm" representing Friends of Weiner, noting that Friends of Weiner relied on
7 counsel for its compliance work and that counsel used a consultant for assistance with that work.
8 *Id.*

9 Friends of Weiner further states that Burns did not bill Friends of Weiner for her services
10 until Representative Weiner's final days in office and is merely using the Commission's
11 enforcement process "to buttress a baseless — and substantially time-barred — commercial
12 claim."⁴ Resp. at 1. The Committee states that it first heard from Burns regarding the alleged
13 debt on June 17, 2011, the day after Weiner resigned from Congress, and when Weiner was
14 involved in a public controversy. The Committee alleges the invoices submitted with the letter
15 were "backdated to September 2, 2003, and August 21, 2009, purportedly for work done on 2000
16 and 2004 audits." *Id.* at 2.

17 Finally, the Committee states that it relied on guidance from Commission staff on how to
18 handle the demand for payment, explaining that it contacted Commission staff regarding the

⁴ Friends of Weiner contends that the bulk of Burns's claims for services allegedly rendered from 2001 to 2009 would be time-barred under applicable statute of limitations, citing to the Commission's five-year statute of limitations governing enforcement actions, 28 U.S.C. § 2462; Virginia's three-year statute of limitations governing express or implied unwritten contract claims, Va. Code Ann. § 8.01-246(4); and New York's six-year contract statute of limitations, NY CPLR § 213(2). Resp. at 1-2. Friends of Weiner also argues that, absent any actionable commercial claim, there would be no basis to require it to report Burns's claim as a debt. *Id.* The Committee's debts and obligations, however, must be continuously reported until extinguished. 11 C.F.R. §§ 104.3(d), 104.11. In addition, the Commission has recognized that the running of a state statute of limitations on a debt owed by a committee does not generally extinguish the underlying debt under state law and the Commission relies on that result for purposes of the Act's debt reporting rules. See, e.g., Advisory Op. 1988-44 (Bonner for Congress) and Advisory Op. 1999-38 (Ken Calvert for Congress).

1 monetary claim and was advised that under the circumstances described by the Committee at the
2 time, no disclosure was required. *Id.* at 1. The available information shows that the Committee
3 filed an Advisory Opinion Request on how to respond in the matter at issue, discussed the issue
4 with staff from the Policy Division, and subsequently withdrew its request.⁵ *Id.*

5 III. ANALYSIS

6 The Act and Commission regulations require political committees to continuously report
7 the amount and nature of their outstanding debts until those debts are extinguished. 2 U.S.C.
8 § 434(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a). Where there is a "disputed debt," the political
9 committee must report the disputed debt if the creditor has provided "something of value" to the
10 political committee. *Id.* § 116.10(a). A "disputed debt" is "an actual or potential debt or
11 obligation owed by a political committee, including an obligation arising from a written contract,
12 promise or agreement to make an expenditure, where there is a bona fide disagreement between
13 the creditor and the political committee as to the existence or amount of the obligation owed by
14 the political committee." *Id.* § 116.1(d). Until the dispute is resolved, the political committee
15 must disclose any amounts paid to the creditor, any amount the political committee admits it
16 owes, and the amount the creditor claims is owed. *Id.* § 116.10(a).

17 The Complaint and other available information in the record do not provide information
18 sufficient to establish that any actual or disputed debt existed between Friends of Weiner and
19 Burns from 2001 (when Burns's services were allegedly first rendered) to June 17, 2011 (when
20 Burns sent a certified letter to Friends of Weiner demanding payment). First, Burns has

⁵ On January 31, 2012, the Committee treasurer, submitted a request for an advisory opinion on how to handle a demand for payment from a vendor for a debt it asserted was not bona fide.

In its request, the Committee explained that it was contacted by a vendor with whom it never had a contract, for services allegedly provided to the Committee many years ago, most of which was past any applicable statute of limitations, and for which the vendor had not previously claimed any unpaid bills or provided any contemporaneous records until now. On March 28, 2012, the Committee withdrew its request for an advisory opinion after concluding, based on guidance from the Policy Division regarding the debt reporting regulations, that the Committee had no reporting obligation with respect to the demand. *Resp.* at 1.

1 produced no evidence that she had a contract with Friends of Weiner. Burns attached to the
2 Complaint invoices itemizing charges for services provided to Friends of Weiner, *see* Compl.,
3 Exs. 1, 3, but there is no corroboration that those documents were created and sent
4 contemporaneously with the dates on the invoices (September 2, 2003 and August 21, 2009), and
5 Friends of Weiner asserts that those invoices are backdated, *see* Resp. at 2. Similarly, though
6 Burns asserts that in addition to sending the invoices she "made repeated attempts over the years
7 to collect the debt owed by Weiner" and "had numerous conversations with Weiner staff about
8 the outstanding debt," *see* Compl. at 4, she has provided no names, dates, e-mails, letters, or
9 contemporaneous documents to support these conclusory assertions.⁶ Moreover, Burns's
10 assertion that Friends of Weiner owed her over \$15,000 as of 2003, is undermined by her claim
11 that, notwithstanding that debt, she provided over \$50,000 in additional services to Friends of
12 Weiner from 2005 to 2009. *Cf.* 11 C.F.R. § 116.4(d)(3)(ii) (a commercial vendor has acted in a
13 commercially reasonable manner in attempting to collect a debt if it "withholds delivery of
14 additional goods or services until overdue debts are satisfied").

15 Friends of Weiner denies having a contractual relationship with Burns, hiring her, being
16 in privity with her, or otherwise directing or supervising her services. Resp. at 2. As noted
17 above, Friends of Weiner asserts that to the extent Burns provided it services, "she did so at the
18 request and under the direction of a law firm" representing Friends of Weiner, and the
19 Committee therefore had no financial responsibility for any such services. *Id.* Indeed,
20 Committee disclosure reports reflect numerous disbursements to Perkins Coie, LLC, during the

⁶ By contrast, in previous matters involving allegations of unpaid services or disputed debts, there has typically been evidence of a past or present contractual relationship with the political committee or the committee has acknowledged the existence of a relationship, but disputed that a debt was owed. *See, e.g.,* MUR 5624 (Jaliman) (committee acknowledged that complainants provided services to the campaign for which they were initially unpaid, but claimed that complainants primarily served as volunteers, and thus the value of the services did not need to be reported).

1 period from 2003 to 2011 for legal services provided to Friends of Weiner, but no disbursements
2 to Burns.⁷ Accordingly, there is insufficient information to establish that an actual or disputed
3 debt existed between Friends of Weiner and Burns from 2001 to June 2011, that Friends of
4 Weiner would have been required to disclose during that time under 2 U.S.C. § 434(b)(8) and
5 11 C.F.R. §§ 104.3(d), 104.11(a).

6 With the record now before us, whether the letter Burns sent to Friends of Weiner on
7 June 17, 2011, her contact with the Committee on January 27, 2012, and information that she
8 was involved with the audits, created a "disputed debt" that Friends of Weiner was required to
9 subsequently disclose, is a closer question. Unlike the invoices Burns purportedly sent to
10 Friends of Weiner in 2003 and 2009, the June 17, 2011 letter requesting payment is substantiated
11 by the record, including the Committee's own acknowledgement that it received the letter.
12 Further, the available evidence indicates that Burns may have "provided something of value" to
13 the Committee under section 116.10(a) in the form of services in connection with the
14 Commission audits, although it is disputed whether any such services were provided directly to
15 the Committee or through sub-contracted services.

16 Nevertheless, we recommend that the Commission dismiss the Complaint's allegations as
17 a matter of prosecutorial discretion given the following factors: (1) over ten years passed from
18 the time Friends of Weiner allegedly began incurring the debt to the time that Burns demanded
19 payment; (2) the nature of the relationship between Burns and the Committee is disputed; and (3)
20 Friends of Weiner is now essentially defunct and intends to terminate. Accordingly, the
21 Commission should dismiss the allegations that Friends of Weiner and Nelson Braff in his
22 official capacity as treasurer violated 2 U.S.C. § 434(b)(8) and close the file. *See Heckler v.*
23 *Chaney*, 470 U.S. 821 (1985).

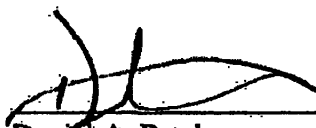
⁷ See *supra* n.2, describing Burns's work with Perkins Coie in connection with the audits.


IV. RECOMMENDATIONS

1. Dismiss, as a matter of prosecutorial discretion, the allegations that Friends of Weiner and Nelson Braff in his official capacity as treasurer violated 2 U.S.C. § 434(b)(8).
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.

Date:

8/1/13


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