

APR 27 2009

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

MUR 6153

NEW MEXICO DEMOCRATIC

LEGISLATIVE CAMPAIGN COMMITTEE,

et al.

CASE CLOSURE UNDER THE
ENFORCEMENT PRIORITY
SYSTEM

2009 APR 27 P 4: 53

SENSITIVE

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, matters that are low-rated ☐ ☐ ☐

☐ are forwarded to the Commission with a recommendation for dismissal. The Commission has determined that pursuing low-rated matters compared to other higher-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss these cases. The Office of General Counsel scored MUR 6153 as a low-rated matter.

In this matter, the complainant, Whitney W. Cheshire, the Executive Director of the Republican Party of New Mexico, alleges that the New Mexico Democratic Legislative Campaign Committee ("NMDLCC" or "the Committee"), a state party committee that is not registered with the Federal Election Commission ("FEC"), paid for and distributed mailers to voters in New Mexico. The mailers were largely directed toward advocating for the election of state representative Ben Rodefer, but also supported the election of a federal candidate, Barack Obama for president. Specifically, the first page of the two-page mailer exhorts readers to "elect Ben Rodefer & Barack Obama" and includes photographs of both men, in addition to photographs of two state and two federal officeholders from New Mexico, with a caption stating that they agreed that both men should be elected. According to the complainant, as a nonfederal committee, the NMDLCC accepted funds that did not comply with the FEC's limitations and prohibitions, including the receipt of corporate and excessive

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individual contributions.¹ The complainant maintains that, because the mailers, which were public communications, supported and promoted the candidacy of a clearly identified candidate, Barack Obama, the Committee engaged in federal election activity ("FEA"), pursuant to 2 U.S.C. § 431(20)(A)(iii) and 11 C.F.R. § 100.24(b)(3), which then required the mailers at issue to be paid for with FEC-compliant funds. See 2 U.S.C. § 441i(b)(2)(A)(i) and 11 C.F.R. § 300.32(a)(2). Thus, the complainant maintains that the Committee may have paid for the mailers with funds that did not comply with the requirements of the Federal Election Campaign Act of 1971, as amended ("the Act").

In response, the Committee asserts that the mailings, which included photographs of, and endorsements by, prominent state and federal New Mexico officeholders, were primarily intended to benefit a state candidate, Mr. Rodefer. Although the Committee acknowledges that the mailers qualified as FEA, it claims that, since it did not meet the expenditure threshold for political committee status, it was not subject to the reporting requirements of the Act. Specifically, in addressing whether it had triggered political committee status through its expenditure on the mailers, the Committee takes the position that the portion devoted to Mr. Obama's candidacy constituted no more than 5 percent of the total costs associated with the mailers (i.e., approximately \$150 of the total \$3,003.64 expended). Therefore, according to the Committee, the portion of its disbursement that constituted an expenditure, as defined in 2 U.S.C. § 431(9)(A) and 11 C.F.R. § 100.111(a), was below the \$1,000 expenditure threshold for invoking political committee status. See 2 U.S.C. § 431(4)(C); 11 C.F.R. § 100.5(c). Additionally, the Committee asserts that, given the low

¹ New Mexico state law allows unlimited individual, corporate and PAC contributions to state and local candidates and political parties. See Christianson, Coyle, Poliakoff and Dyer, *Lobbying, PACs, and Campaign Finance: 50 State Handbook* (2008 edition) at 1045.

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1 amount of the expenditure devoted to federal activity, it was not required to file an
2 independent expenditure report, pursuant to 2 U.S.C. § 434(c).²

3 The Committee also noted that the funds used to pay for the federal portion of the
4 mailers came from contributions that complied with the limitations and prohibitions of the
5 Act. In support of its contention the Committee attached its state disclosure reports to its
6 response, which evidenced contributions it received between June and October 2008. The
7 Committee believes that its reports show that contributions it received during the period in
8 which the mailers were developed came from sources that are permissible under the Act.

9 The Committee acknowledged that the disclaimer on its mailers, which contained
10 the phrase "Paid for by the NMDLCC," was defective, since the mailers were sent to more
11 than 500 persons and expressly advocated for the election of a federal candidate, Barack
12 Obama, but failed to state whether Mr. Obama had authorized them. *See* 11 C.F.R.
13 §§ 110.11(a) and (b). In addition, the Committee admitted that the mailers lacked a printed
14 box around the disclaimer. *See* 11 C.F.R. § 110.11(c). The Committee has promised to
15 ensure that its disclaimers are correct in the future.

16 The available information indicates that the amount of funds used to create and
17 distribute the mailers (\$3,003.64) was minimal. Although the entire expenditure would be
18 considered for FEA purposes, we note that only a portion of the mailers were directed to a
19 federal candidate.³ Additionally, it appears that the Committee may have used permissible
20 funds, which were subject to the limitations and prohibitions of the Act, to pay for the

² *See also* 11 C.F.R. § 109.10(b) (which requires non-federal committees and others to report independent expenditures exceeding \$250 within a calendar year).

³ *See* MUR 6019 (Caserta) (The Commission dismissed a matter involving a non-federal candidate committee that spent in excess of \$4,000 in non-FEC-compliant funds for brochures that may have promoted clearly identified federal candidates, in addition to a non-federal candidate).

mailers.⁴

Accordingly, in considering the relatively small amount in potential violation, along with the Commission's priorities and resources, and relative to other matters pending on the Enforcement docket, the Office of General Counsel believes that the Commission should exercise its prosecutorial discretion and dismiss this matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Additionally, this Office recommends that the Committee be cautioned that their failure to affix the appropriate disclaimer to their mailers could have violated the disclaimer requirements under 2 U.S.C. § 441d and 11 C.F.R. § 110.11.

RECOMMENDATIONS


The Office of General Counsel recommends that the Commission dismiss MUR 6153, send a cautionary notification to the New Mexico Democratic Legislative Campaign Committee concerning its potential violation of 2 U.S.C. § 441d and 11 C.F.R. § 110.11, close the file, and approve the appropriate letters.

⁴ According to the Committee's state disclosure reports, it apparently received enough FEC-compliant funds to pay for the entire expenditure. *See* 11 C.F.R. § 300.36(a) (when a State, district, or local committee that is not a political committee makes a payment for IEA activity, it must demonstrate through a reasonable accounting method that it has sufficient funds to do so).

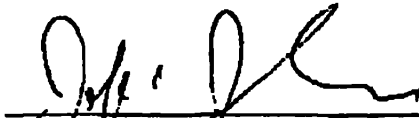
Thomasenia P. Duncan
General Counsel

4/27/09
Date

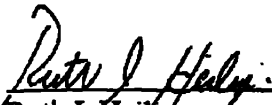
BY:



Gregory R. Baker
Special Counsel
Complaints Examination
& Legal Administration



Jeff S. Jordan
Supervisory Attorney
Complaints Examination
& Legal Administration



Ruth L. Heilizer
Attorney
Complaints Examination
& Legal Administration

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