



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 19 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Nancy Smith

Sunnyvale, CA 94086

RE: MUR 6019
Dominic Caserta for Assembly Committee
R. Michael Kasperzak

Dear Ms. Smith:

On March 5, 2009, the Federal Election Commission reviewed the allegations in your complaint dated May 23, 2008, and found that on the basis of the information provided in your complaint, and information provided by the respondents, there is no reason to believe R. Michael Kasperzak violated the Federal Election Campaign Act of 1971, as amended, or the Commission regulations. Also on that date, the Commission decided to dismiss the allegation that Dominic Caserta for Assembly used non-federal funds to promote the election of federal candidates. Accordingly, on March 5, 2009, the Commission closed the file in this matter.

Documents related to this case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact Kamau Philbert, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Dominic Caserta for Assembly Committee MUR: 6019
 R. Michael Kasperzak

 This matter was generated by a complaint filed with the Federal Election
Commission by Nancy C. Smith. *See* 2 U.S.C. § 437g(a)(1).

I. INTRODUCTION

 The complaint alleges that a brochure distributed by the campaign of Dominic
Caserta, a candidate for the California State Assembly, promoted the presidential
candidacy of Barack Obama, and therefore was impermissibly paid for with non-federal
funds. The brochure, which advocated Caserta’s candidacy, identifies a local individual
who is endorsing Caserta as a “Precinct Captain” of “Barack Obama for President” and
includes a statement that the endorser (R. Michael Kasperzak) supports Obama for the
Democratic presidential nomination. Although there is a basis for concluding that
language in the brochure promotes Obama’s candidacy, given the small amount of money
involved, the Commission exercises its prosecutorial discretion to dispose of this matter
at the initial stage of the enforcement process.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

 This matter focuses solely on a two-sided campaign brochure, of which the
Caserta Committee commissioned 60,000 copies at a total cost of \$4,336.97. The front of
the brochure contains an endorsement letter under the following letterhead:

R. Michael Kasperzak
Precinct Captain In Santa Clara County
Barack Obama for President

The endorsement, which advocates Caserta's election, begins with the following:

Dear Democratic Friend, whether you support Barack Obama (as I do) or Hillary Clinton, there is one Democratic candidate we can all agree on: **Dominic Caserta for State Assembly.**

(emphasis in original). In addition to noting Kasperzak's association with the Obama campaign in the letterhead, the signature block on the endorsement includes "Precinct Captain in Santa Clara County, Barack Obama for President" as Kasperzak's title. Kasperzak's name and title as Obama Precinct Captain appears at the return address section of the brochure, along with a disclaimer identifying the Caserta Committee.

The back side of the brochure consists of a signed letter from Caserta stating that he was thrilled that "we have two outstanding Democratic candidates running for President," and that he has been endorsed by local leaders of the **Barack Obama for President** campaign and spoke at a recent **Hillary Clinton for President** rally. (emphasis in original). A picture of Caserta with then-Presidential candidate Hillary Clinton appears alongside the statement.

Complainant alleges that the brochure violates federal regulations prohibiting the use of non-federal funds to promote federal candidates. The Caserta Committee denies violating the relevant federal laws and asserts that the brochure is designed to promote Caserta's State Assembly campaign, and does not solicit support for Barack Obama (or Hillary Clinton). The Caserta Committee claims that the Kasperzak letter was intended to support the statement (on the back of the brochure) that Caserta's campaign has been

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1 endorsed by local leaders of Barack Obama for President. The Caserta Committee
2 similarly claims that the picture of Hillary Clinton and Caserta was intended to support
3 the corresponding statement that Caserta had spoken at a recent rally for Hillary Clinton.

4 Kasperzak, a former mayor and city council member of the City of Mountain
5 View, was a precinct captain for Obama's campaign during the California presidential
6 primary in February 2008 and is a campaign volunteer for Obama's campaign.

7 Kasperzak stated that he endorsed Caserta, volunteered in Caserta's campaign, and
8 offered Caserta's campaign the use of his name. He further explained that he provided
9 Caserta's campaign with a copy of his signature for a mailing, but did not authorize or
10 was involved in the creation, development, or distribution of the brochure at issue.

11 **B. Discussion**

12 The Federal Election Campaign Act of 1971, as amended ("the Act"), and
13 Commission regulations prohibit state and local candidates or officeholders, or their
14 agents, from paying for a public communication that refers to a clearly identified
15 candidate for federal office (regardless of whether a candidate for state or local office is
16 also mentioned or identified), and that promotes or supports any candidate for that federal
17 office, or attacks or opposes any candidate for that federal office (regardless of whether
18 the communication expressly advocates a vote for or against a candidate) unless the funds
19 used to pay for the communication consist of federal funds that are subject to the
20 limitations, source prohibitions, and reporting requirements of the Act. *See* 2 U.S.C.
21 § 441i(f)(1); 11 C.F.R. § 300.70 and 71.

22 In addition, a public communication that refers to a clearly identified candidate
23 for federal office and that promotes or supports a candidate for that office, or attacks or

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1 opposes a candidate is one type of federal election activity. *See* 2 U.S.C.
2 § 431(20)(A)(iii); 11 C.F.R. § 100.24(b)(3). A public communication is a communication
3 by means of any broadcast, cable, or satellite communication, newspaper, magazine,
4 outdoor advertising facility, mass mailing, or telephone bank to the general public, or any
5 other form of general public political advertising. *See* 2 U.S.C. § 431(22); 11 C.F.R.
6 § 100.26. The brochure appears to qualify as a public communication, since the invoice
7 provided by the Caserta Committee shows that it was part of more than 500 pieces of
8 mail matter of an identical or substantially similar nature within any 30-day period. *See*
9 2 U.S.C. § 431(23); 11 C.F.R. § 100.27. Therefore, whether there is a violation of the
10 Act and Commission regulations depends on whether the brochure promotes or supports
11 a named federal candidate and, if it was, whether it was paid for with federal funds.

12 The statement in the brochure that “we have two outstanding Democratic
13 candidates running for President” combined with the repeated references to **Barack**
14 **Obama for President** and more limited references to **Hillary Clinton for President**
15 arguably promotes Obama and Clinton in their capacity as presidential candidates.

16 The Caserta Committee’s response suggests that the Obama and Clinton
17 references were intended merely to identify those candidates’ respective campaigns.
18 However, the references go beyond the “mere identification” exception that the
19 Commission has previously allowed in several Advisory Opinions. *See* Advisory
20 Opinions 2007-34 (Jackson, Jr.), 2007-21 (Holt), and 2003-25 (Weinzapfel). In those
21 AOs, the Commission concluded that the use of a federal candidate’s name or likeness in
22 a public communication solely for the purpose of endorsing a candidate for state office
23 does not run afoul of the Act and Commission regulations. Significantly, those AOs

1 addressed the use of the federal candidate's name and likeness and did not address the
2 specific reference to the federal candidacy ("for President") and the statement of support
3 that we have in this case.

4 Significantly, it does not appear that the brochure was paid for with federal funds.
5 The Caserta Committee is a nonfederal committee that is not registered with, nor
6 discloses its disbursements or receipts to, the Commission. Our review of its state
7 disclosure reports indicates that the Caserta Committee may have had sufficient funds
8 subject to the limitations and prohibitions of the Act. *See* <http://cal-access.ss.ca.gov>.
9 However, those funds were not subject to the reporting requirements of the Act, and thus
10 do not constitute federal funds. *See* 11 C.F.R. § 300.71.

11 In sum, although the available information indicates that the Caserta Committee
12 may have intended to promote Caserta's candidacy, the brochure may also have
13 promoted the candidacies of Obama and Clinton, and was not paid for with federal funds.
14 Accordingly, the Caserta Committee may have violated 2 U.S.C. § 441i(f)(1) and
15 11 C.F.R. § 300.71. However, there is no basis on which to conclude that Kasperzak
16 personally violated the Act or Commission regulations, since it does not appear that he
17 paid for the brochure or was an agent of Caserta or the Caserta Committee. *See* 2 U.S.C.
18 § 441i(f)(1); 11 C.F.R. § 300.70.¹

¹ Complainant made no allegation, nor is there evidence indicating that the Caserta Committee coordinated with either the Obama or Clinton campaigns in creating and distributing the brochure. *See* 11 C.F.R. § 109.21. Kasperzak denied any involvement in the creation or distribution of the brochure, acknowledging only that he authorized the Caserta Committee to use his name, affiliation with the Obama campaign, and signature for a different mailing. Further, the available information does not provide a basis on which to conclude that either the Obama or Clinton campaigns had interactions with the Caserta Committee that would satisfy the conduct prong of the coordination regulations. *Id.*

1 This matter does not appear to warrant further enforcement action. The available
2 information indicates that the amount of funds used to create and distribute the brochure
3 (\$4,337) was minimal. Accordingly, the Commission exercises its prosecutorial
4 discretion to dismiss the allegation that the Caserta Committee used non-federal funds to
5 promote the election of federal candidates. The Commission also finds no reason to
6 believe R. Michael Kasperzak violated the Act or Commission regulations and closes the
7 file in this matter.

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