

DEC 03 2007

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Jesse Burchfield)
John Buchalski, in his personal capacity) MUR 5646

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED

take no further action other than admonishment as to John Buchalski, the Committee's named treasurer, in his personal capacity, as to violations of 2 U.S.C. §§ 434(b) and 432(c).

II. INTRODUCTION

This matter was referred by the U.S. Attorney's Office in New Hampshire (the "USAO"), as it was conducting a criminal investigation following the collapse of Burton Cohen's campaign for the 2004 Democratic nomination to the U.S. Senate in New Hampshire, Cohen for New Hampshire ("the Committee"). The referral involved: 1) the deliberate misreporting of the campaign's financial activity by Jesse Burchfield, Cohen's campaign manager, who disappeared 17 months into the campaign leaving a large discrepancy between the campaign's actual and last reported cash-on-hand; 2) Burchfield's apparent personal use of campaign funds; and 3) the impermissible use of funds from Cohen's New Hampshire state senate campaign to pay federal campaign expenses.¹

¹ As a result of the USAO's investigation, Burchfield pled guilty on November 14, 2005 to one count of filing false statements with the Federal Election Commission ("the Commission") in violation of 18 U.S.C. § 1001. Burchfield was later sentenced to one year of probation with six months of home confinement. No monetary fine or restitution was ordered as part of the sentence.

1 [redacted] the Commission previously found reason to believe that Jesse Burchfield
2 knowingly and willfully violated 2 U.S.C. § 434(b) and violated 2 U.S.C. §§ 432(c) and
3 439a(b).² The Commission also found reason to believe that John Buchalski violated 2 U.S.C.
4 §§ 434(b) and 432(c) in his personal capacity by recklessly failing to perform his duties as
5 designated treasurer based on his admission in news reports that he sometimes signed incomplete
6 disclosure reports.

7 The evidence gathered during the investigation established that Burchfield spent
8 approximately \$10,000 in campaign funds for his personal use in violation of 2 U.S.C. § 439a(b),
9 an act facilitated for more than a year by the absence of any effective internal financial controls
10 in the Committee's operation.⁷ The evidence also shows that in an effort primarily directed at

² The Commission also found reason to believe that Cohen for New Hampshire and John Buchalski, in his official capacity as treasurer, knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) and violated 2 U.S.C. §§ 434(b), 432(c), 439a(b), and 432(h); and that Burton Cohen knowingly and willfully violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d). The Commission made probable cause findings with respect to Mr. Cohen and the Committee and Mr. Buchalski, in his official capacity as treasurer, on November 14, 2007.

⁷ [redacted]

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1 making Cohen's U.S. Senate campaign appear viable, Burchfield deliberately failed to disclose
2 \$187,720 in disbursements in the Committee's FEC reports to inflate the Committee's cash-on-
3 hand; he also misreported \$117,720 in receipts by under-reporting \$6,590 in receipts in one
4 report, over-reporting a total of \$26,140 in receipts in three reports, and in the last report,
5 fabricating or inflating \$49,900 in itemized contributions and failing to itemize another \$35,090
6 in contributions. He also failed to maintain accurate records of disbursements. Burchfield's
7 actions constitute a violation of 2 U.S.C. § 432(c) and the deliberate nature of his misreporting
8 further constitutes a knowing and willful violation of section 434(b).⁴

9 As a result of the investigation, we now recommend that the Commission

10 take no further action other than
11 admonishment with regard to the Committee's named treasurer, John Buchalski, in his personal
12 capacity, as discussed in Section III.D.

13 **III. RESULTS OF THE INVESTIGATION**

14 **A. BACKGROUND**

15 Cohen first hired Burchfield in March 2002 to manage his campaign for re-election to the
16 New Hampshire State Senate for a seventh term. After winning that election, Cohen hired him to
17 manage his U.S. Senate campaign, a prospect they had previously discussed during the state

⁴ The evidence gathered during the investigation also determined that Burchfield and Cohen spent between \$23,800 and \$25,360 in state campaign funds to finance start-up expenses for Cohen's U.S. Senate campaign in violation of 2 U.S.C. § 441i(e) and 11 C.F.R. § 110.3(d) and that Burchfield knew that using those funds was prohibited by law. At the time of the First General Counsel's Report, we had limited knowledge of Burchfield's role in the use of state funds for the federal campaign. As such, we only recommended reason to believe findings as to the candidate and the Committee for that violation.

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1 campaign.⁵ Cohen and Burchfield began working on the federal campaign in late November
2 2002. See JB Aff. ¶ 10 and BC Tr. at 51, 63-65, and 68-75. Burchfield's duties with the
3 Committee included handling the Committee's finances and preparing and filing the
4 Committee's FEC disclosure reports. Committee Treasurer John Buchalski had no role in the
5 operation of the campaign except to sign the first two Committee disclosure reports, and
6 amendments thereto, brought to him by Cohen or Committee staff.

7 By June 2004, Cohen had decided to replace Burchfield as campaign manager after
8 repeated complaints from staff about Burchfield's management of the campaign and lack of
9 interpersonal skills. In an interview, Cohen explained that he did not inform Burchfield of his
10 plan, intending to present the new hire as someone to "assist" Burchfield so that Burchfield
11 would not "quit in a huff and stir up the press." Nevertheless, rumors of Burchfield's
12 replacement reached lower level staff, and on June 7, 2004, Burchfield sent an e-mail entitled
13 "Goodbye" to Cohen and other campaign staff. He informed them that "expenses for the past
14 year and a half have outpaced our income consistently," that "currently the campaign is almost
15 broke," offered to "provide any help needed to the FEC," and urged them to meet with the
16 campaign's consultants to "move past this." Attachment 1 at 1-2.

17 The next day, Burchfield sent a second e-mail to Cohen in which he admitted that he had
18 not told Cohen about the campaign's true financial situation, denied accusations that he had
19 stolen money, and offered to cooperate in any investigation. Attachment 1 at 3-4. Burchfield
20 also left a voice-mail message for Cohen in which he apologized to Cohen, expressed his hope
21 that Cohen would continue with the campaign, advised that he was drafting a letter to the FEC

⁵ During the state campaign, Cohen and Burchfield decided to raise more money than Cohen likely needed to win re-election to the state senate so that they could use the excess funds in a bid for Governor of New Hampshire, or most likely U.S. Senate, to begin after the state election. See Jesse Burchfield Affidavit ("JB Aff.") ¶¶ 3-4, 6. See also Cohen Deposition Transcript ("BC Tr.") at 38.

1 for Cohen's approval taking "the blame for all of this," and stated "it's all my fault." Attachment
2 1 at 5-6. In his interview with us, Burchfield said that he left the campaign when he did because
3 a large bill for media services was coming due and the Committee would not be able to pay it.

4 After they received Burchfield's e-mail, Committee staff and some of its consultants
5 quickly confirmed the Committee's dire financial condition. Cohen dropped out of the race on
6 June 10, 2004; hired counsel and an accounting firm to conduct a forensic audit, initially to
7 determine if Burchfield had embezzled funds; and then notified the FBI about the situation.

8 B. BURCHFIELD'S PERSONAL USE OF CAMPAIGN FUNDS

9 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits the
10 conversion of campaign contributions to personal use. 2 U.S.C. § 439a(b). This provision
11 prohibits "any person" from using campaign funds for personal use. *Id.*; 2 U.S.C. § 431(11)
12 (defining "person" under the Act to include individuals and committees). The Act sets forth
13 examples of *per se* instances of improper personal use, such as using campaign contributions or
14 donations for clothing purchases, vacations, and non-campaign related entertainment expenses.
15 See 2 U.S.C. § 439a(b)(2)(A)-(I); see also 11 C.F.R. § 113.1(g). In addition, the Act considers a
16 contribution or donation improperly converted for personal use if "the contribution or amount is
17 used to fulfill any commitment, obligation, or expense of a person that would exist irrespective"
18 of the campaign. 2 U.S.C. § 439a(b)(2).

19 The investigation revealed that Burchfield converted between \$4,681 and \$10,381 in
20 campaign funds to his personal use. Burchfield specifically admitted that he used the
21 Committee's bankcard to pay for \$4,681 in personal expenses, including electronic transfers to a
22 PayPal account that he used to purchase personal items, debit card disbursements for adult
23 websites and pet supplies, and debit card disbursements and ATM withdrawals for rental cars

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1 and cash for his use while on vacation.⁶ JB Aff. ¶ 26. In addition, Burchfield admitted that
2 another \$9,500 in ATM withdrawals and debit card transactions, identified for us by the
3 Committee's auditor as possible personal use disbursements, were for a mixture of personal
4 expenses and miscellaneous campaign expenses such as office supplies, stamps, and cash
5 payments to student interns. In an interview, Burchfield estimated that 60% of the \$9,500 in
6 remaining disbursements (\$5,700) was used for personal expenses, but he was unwilling to
7 include an estimated figure in an affidavit.

8 We were unable to verify exactly how much of the remaining \$9,500 in Committee funds
9 may have been for personal use versus campaign expenses. We received conflicting information
10 from former campaign staffers about the use of cash to pay student interns and to purchase
11 supplies and postage. David Mowrey and Sharon Valdez told us cash was not used and the
12 student interns identified to us appear to have been paid by check. Two campaign staff members
13 hired in 2004, however, confirmed that Burchfield sometimes gave them cash to pay for
14 miscellaneous campaign related expenses such as lunch and repairs to a video camera. _____

15 _____
16 _____
17 _____

⁶ Burchfield justified his use of campaign funds to pay personal expenses through these ATM withdrawals and debit card transactions as a way to make up for the Committee's failure to pay his full salary throughout the campaign. JB Aff. ¶¶ 24-25. He asserted that the total amount attributable to his personal use did not exceed the salary shortfall. We are unable to confirm or refute Burchfield's assertion because he and Cohen provided conflicting testimony as to Burchfield's salary level and no documentation of Burchfield's final salary agreement apparently exists. Bank records do indicate that in several months, Burchfield received less than the lower salary figure cited by Cohen. Even if Burchfield's assertion is true that his conversion of campaign funds to personal use did not exceed his overall salary shortfall, however, to credit Burchfield's reasoning, in essence an equitable offset defense, would subvert the statutory requirements that committees maintain accurate records of all disbursements and make disbursements in excess of \$100 by check. It could also facilitate other violations of law such as avoiding income tax liability.

C. BURCHFIELD'S REPORTING AND RECORDKEEPING VIOLATIONS

The Commission previously found reason to believe that Burchfield violated 2 U.S.C. § 432(c) and knowingly and willfully violated 2 U.S.C. § 434(b) in his capacity acting as *de facto* treasurer of the Committee. The investigation confirmed that Burchfield violated the recordkeeping provisions of the Act and knowingly and willfully violated the reporting provisions of the Act. The Committee's bank records and a comparison of the FEC reports filed by Burchfield and the final amended reports filed by the Committee show that Burchfield failed to disclose disbursements totaling \$187,720 in the five disclosure reports he filed with the Commission covering the period of January 1, 2003 through March 31, 2004, about 41% of the Committee's total disbursements as reported in its final amended reports. Burchfield also misreported \$117,720.30 in receipts by under-reporting \$6,590 in receipts in the 2003 July Quarterly Report, over-reporting a total of \$26,140 in receipts in the 2003 April, October, and Year End Reports, and in the last report he filed, the 2004 April Quarterly Report, fabricating or inflating \$49,900 in itemized contributions and failing to itemize 119 contributions totaling \$35,090.⁷ Thus, the reporting violations total \$305,440.⁸

⁷ The \$49,900 in fabricated or inflated contributions consisted of 22 completely fictitious contributions. The remainder included 11 contributions with inflated amounts and inaccurate dates and two contributions that were received outside the reporting period. Burchfield told us that he did not remember inflating those Committee receipts, and, in particular, could not recall anything about the fictitious contributions. Except for the fictitious contributions, much of the inflating of receipts appears to have resulted from the inclusion of contributions received after the end of a particular reporting period but before the filing date.

⁸ The total amount in violation for misreporting includes the failure to report the Committee funds Burchfield converted to personal use and the state campaign funds used for Committee expenses.

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1 The Act requires that treasurers file disclosure reports that accurately reflect a
2 committee's cash-on-hand and disclose all contributions and disbursements, including the
3 identification information for contributions and disbursements exceeding \$200. *See*
4 2 U.S.C. § 434(b). The Act also requires that treasurers keep an account of the name, address,
5 date, amount, and purpose of disbursements, including a receipt, invoice, or cancelled check for
6 disbursements in excess of \$200. 2 U.S.C. § 432(c)(5). Because a treasurer is responsible for
7 filing complete and accurate disclosure reports and maintaining accurate records for the
8 committee, a treasurer may also be held personally liable for violations for the Act under certain
9 circumstances, including when his or her actions are knowing and willful. *See Statement of*
10 *Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 3, 5 (Jan. 3,
11 2005); *Federal Election Comm'n v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985 (D.N.J.
12 1986); and *Federal Election Comm'n v. Gus Savage for Cong. 82 Comm.*, 606 F. Supp. 541, 547
13 (N.D. Ill. 1985).

14 Further, the Commission has found individuals personally liable, including assistant
15 treasurers, campaign managers, and candidates themselves, for reporting and recordkeeping
16 violations of the Act, when they acted as *de facto* treasurers for a committee. *See, e.g.*, MUR
17 5610 (Dole North Carolina Victory Committee) (finding assistant treasurer liable for knowing
18 and willful reporting and recordkeeping violations where he acted as *de facto* treasurer); MUR
19 5358 (Morgan for Congress) (finding candidate liable for reporting fictitious and inflated
20 contributions and disbursements where, despite having a named treasurer, he performed all the
21 duties of the treasurer for his campaign); MUR 5453 (Giordano for U.S. Senate Committee)
22 (deputy treasurer functioning as *de facto* treasurer held liable for accepting excessive and
23 prohibited contributions and underreporting receipts on behalf of committee). *See also* MUR
24 4872 (Jenkins for Senate 1996) (finding candidate liable for knowing and willful reporting

1 violations relating to expenditures for phone bank activity where named treasurer was unaware
2 of underlying facts).

3 The investigation confirmed that in his handling of receipts and disbursements and
4 preparing and filing Committee disclosure reports with the Commission, Burchfield was
5 performing virtually all of the statutory duties of the treasurer. From the beginning of the
6 campaign, Cohen gave Burchfield broad authority to handle the Committee's finances such as
7 making deposits, tracking disbursements, and controlling the Committee's bank statements and
8 bankcard. *See* BC Tr. at 57-59; 101-103; 110-11; 113-116 and JB Aff. ¶15.⁹ *See also* Reply of
9 Burt Cohen and the Committee to the General Counsel's Briefs at 5-6. He also delegated to
10 Burchfield the responsibility for preparing and filing disclosure reports with the Commission and
11 learning and complying with FEC law. *See* BC Tr. at 41-42 and 95-97; *see also* JB Aff. ¶¶ 16
12 and 21. Thus, Burchfield prepared and filed the Committee's FEC disclosure reports, and was
13 responsible for their accuracy and timeliness, as well as for keeping an account of all
14 disbursements.

15 Burchfield has admitted that he intentionally filed false disclosure reports with the
16 Commission on behalf of the Committee and claims that he did so primarily to inflate the cash-
17 on-hand figures to make the Committee appear financially viable.¹⁰ *See* JB Aff. ¶¶ 20 and 21. In

⁹ Cohen testified that he left it up to Burchfield to set up the procedures for handling the Committee's funds. BC Tr. at 110-11. Accordingly and more specifically, Burchfield picked up the daily mail, including contribution checks, from the Committee's Post Office box, checked Internet contributions, deposited contribution checks, prepared checks for Cohen's signature, moved funds between the Committee's two bank accounts, and kept possession and control over the Committee's bank card, checkbook, and bank statements. JB Aff. ¶¶ 15 & 16. *See also* BC Tr. at 57-59.

¹⁰ The phrase knowing and willful indicates that "actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H 2778 (daily ed. May 3, 1976); *see also Federal Election Comm'n v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing between "knowing" and "knowing and willful"). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge" that an action was unlawful. *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990).

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1 explaining his actions in an interview, Burchfield said that very few people took Cohen's
2 candidacy seriously and money was the only way to show that he could be a viable candidate.
3 Burchfield also admitted that he omitted from the Committee's first disclosure report the federal
4 expenses paid for with state campaign funds because he knew using those funds in a federal
5 election was prohibited.¹¹ JB Aff. ¶¶ 17 and 21. Only a small percentage of the unreported
6 disbursements, about 5%, is attributable to Burchfield's failure to report disbursements relating
7 to his personal use of campaign funds.

8 Our review of the Committee's bank records and the Committee's disclosure reports
9 corroborate Burchfield's admission that he knowingly and willfully filed inaccurate disclosure
10 reports, primarily by underreporting disbursements to inflate the Committee's cash-on-hand
11 figures and make it appear more financially sound. Most of the undisclosed disbursements were
12 typical campaign expenses such as a \$30,000 disbursement for polling, travel expenses relating
13 to fundraising, printing and copying expenses, salary payments, and postage. In some of the
14 earlier disclosure reports, Burchfield also inflated contributions during particular reporting
15 periods by including contributions received after the last date of the reporting period but before
16 the filing date, and later by reporting fictitious and inflated contributions. *See supra* at 7.

17 Burchfield's admission that he deliberately filed inaccurate reports primarily to make the
18 campaign appear to be viable, and secondarily to hide the impermissible use of state campaign
19 funds and his personal use of campaign funds, establishes his personal liability for knowingly
20 and willfully violating 2 U.S.C. § 434(b), as does his guilty plea for filing false statements with
21 the Commission.

¹¹ Burchfield explained that he looked into the possibility of using excess state campaign funds in a future state or federal election by consulting the FEC website and by consulting with others, including Cunningham, Harris & Associates ("CHA") principal L.A. Harris, and learned federal law prohibited transfers to a federal campaign. JB Aff. ¶¶ 5, 6, and 10. Nevertheless, he and Cohen spent the state funds on federal campaign expenses.

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1 The evidence also shows that Burchfield violated 2 U.S.C. § 432(c) by failing to keep an
2 account of all disbursements. Although Burchfield was responsible for maintaining an account
3 of the name, address, date, amount, and purpose of all of the Committee's disbursements, he
4 admitted that he lost receipts and cited "poor recordkeeping" as a contributing factor to the
5 misreporting in his affidavit. *See* JB Aff. ¶ 20. The fact that the Committee could not
6 specifically describe the purposes of its disbursements in the report it filed with the Commission
7 shortly after Burchfield left the campaign illustrates that the records they needed were not
8 available.¹² Moreover, the record reflects that the Committee requested bank records so that it
9 could file comprehensive amendments to the reports Burchfield filed. *See e.g.*, March 10, 2005
10 Letter from Burt Cohen to Reports Analysis Division, FEC Image 25010103384. Burchfield's
11 admission as to his deficient recordkeeping, and the fact that the Committee lacked the requisite
12 records to properly disclose its disbursements, establish Burchfield's personal liability for
13 violating 2 U.S.C. § 432(c).

14 D. TREASURER'S PERSONAL LIABILITY

15 The Commission previously found reason to believe that the Committee's treasurer, John
16 Buchalski, violated 2 U.S.C. §§ 434(b) and 432(c) in his personal capacity. The reason to
17 believe findings stemmed from public statements by Buchalski that he had signed Committee
18 reports that were only partially complete, in reckless disregard of his statutory duties as treasurer.

19 Our investigation established that Buchalski did not handle the Committee's finances and
20 that his role with regard to reporting was limited to signing, without review, the 2003 April
21 Quarterly and 2003 July Quarterly Reports, and amendments thereto, that Burchfield prepared.
22 In fact, he never visited the campaign's office. *See generally* Buchalski Reason to Believe

¹² The Committee reported the purpose of about \$122,000 in disbursements as "information requested" or "expenses" in its original 2004 July Quarterly Report.

1 ("RTB") Response, Attachment 2; *see also* BC Tr. at 100-101. In an interview _____
2 _____, Buchalski further identified as forgeries the signatures on all Committee
3 reports filed after the 2003 April and July Quarterly Report Amendments. Burchfield has
4 admitted that he signed Buchalski's name on later FEC disclosure reports as the campaign
5 became more hectic. JB Aff. ¶ 19.

6 Buchalski also stated in his RTB response that he remembered signing an incomplete
7 report, and, in one case, a blank report. Buchalski RTB response at 2. None of the three people
8 who brought Buchalski documents to sign remembered presenting Buchalski with a blank report,
9 although Cohen believed he may have asked him to sign reports consisting of only the summary
10 pages. Buchalski's admission that he signed blank or incomplete reports in light of his legal
11 status as treasurer at the time he signed them could serve as a basis for imposing liability under a
12 reckless standard. However, Burchfield, not Buchalski, performed virtually all the duties of
13 treasurer and was the prime cause of the false reporting. Moreover, Buchalski was cooperative
14 with us, _____ and is unlikely to serve as treasurer in any future
15 federal campaign. Therefore, we recommend, as a matter of prosecutorial discretion, that the
16 Commission take no further action as to John Buchalski in his personal capacity
17 other than an admonishment.¹³

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¹³ As noted in the General Counsel's Brief to the Committee and in General Counsel's Report #2, dated November 5, 2007, in which we recommend probable cause to believe findings as to the Committee, Mr. Buchalski remains a respondent in his official capacity.

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V. RECOMMENDATIONS

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2. As a matter of prosecutorial discretion, take no further action as to John Buchalski in his personal capacity other than an admonishment, as to violations of 2 U.S.C. §§ 434(b) and 432(c).

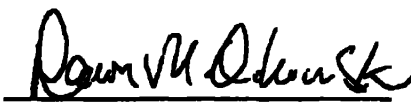
3. Approve the appropriate letters.

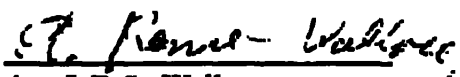
Thomasenia P. Duncan
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