UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 10-989 (BAH)

DEFENDANT FEDERAL ELECTION COMMISSION'S
REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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The Federal Election Commission ("FEC" or "Commission") submits this reply in support of its Motion for Summary Judgment. Plaintiff Ralph Nader argues that the Commission acted contrary to law in disposing of his administrative complaint because the evidence of wrongdoing by respondents was allegedly "ample" and because the Commission lacks the discretion to determine appropriate respondents. These arguments rely on misleading statements about both the facts and law. The Commission reasonably determined that the administrative complaint's extensive reliance on speculation did not warrant opening an investigation, and that many of the over 150 individuals and entities Nader accused of wrongdoing should not be compelled to respond to his allegations. Plaintiff fails to meet his burden of establishing that the Commission abused its discretion by dismissing the administrative complaint.

I. THE COMMISSION'S DETERMINATION THAT THERE WAS NO "REASON TO BELIEVE" THE DNC AND THE KERRY COMMITTEE PARTICIPATED IN UNLAWFUL COORDINATION WAS NOT AN ABUSE OF DISCRETION

The administrative complaint alleged that 54 law firms and 98 attorneys or other law firm employees made illegal in-kind contributions to either Kerry-Edwards 2004, Inc. ("Kerry Committee") or the Democratic National Committee ("DNC") by providing free legal services to contest the ballot petitions for plaintiff's 2004 Presidential campaign. (AR00857-63.) The Commission found that there was no reason to believe that the DNC, Kerry Committee, their treasurers, or John Kerry had accepted illegal in-kind contributions in the form of legal services because the charges were merely "speculative." (AR01841, AR01856.)

Plaintiff argues that the Commission's determination was contrary to law because there was supposedly "ample evidence" to support the allegations. Opp'n to Def. FEC's Mot. for Summ. J. ("Opp.") at 4 (Docket No. 19). Plaintiff identifies several pieces of "evidence" in the administrative record that purportedly support the claim that the DNC and/or the Kerry

Committee accepted illegal in-kind contributions in the form of legal services. The FEC did not "studiously avoid" this evidence, as plaintiff argues (Opp. at 5); the Commission examined it, found that it was too speculative to find reason to believe a violation had occurred, and explained so in the Factual and Legal Analyses it adopted. (AR01841, AR01856.) As explained below, plaintiff elides several elements of both the governing law and parts of the record that was before the Commission. Particularly with a complete view of the available facts and law, the Commission's determination was reasonable.

A. The Legal Services At Issue Could Have Been Unlawful In-Kind Contributions Only If They Were Both Coordinated and Not Performed By Volunteers

Plaintiff asserts that a wealth of evidence supports his allegations of violations of the Federal Election Campaign Act, 2 U.S.C. §§ 431-457 ("Act" or "FECA"), but fails to stop and analyze each element of the alleged violations before determining the probity of the purported evidence. As plaintiff notes, a donation of corporate legal services provided to remove a candidate from the ballot could be part of a "viable theory" of a FECA violation. (Opp. at 3, 8.) But plaintiff fails to demonstrate that *both* of two factual prerequisites were met in order to demonstrate that such illegal in-kind contributions were made. There must have been (1) actual coordination between alleged donors and the DNC or Kerry Committee and (2) legal work performed by non-volunteers. Thus, even if the DNC or Kerry Committee actively worked to keep Nader off the ballot, unless they coordinated that effort with other persons who were providing free services from non-volunteers, no FECA violation would have occurred.

Corporations are prohibited from making any "contribution" in connection with a federal election. 2 U.S.C. § 441b(a). For an illegal contribution to have been made, there must have been an actual "contribution" under the Act made in the first place. 2 U.S.C. § 431(8)(A)(i). But

expenditures made independently do not constitute contributions to a campaign or committee, even if those expenditures were intended to help that campaign or committee. This principle dates back to *Buckley v. Valeo*, 424 U.S. 1 (1976), when the Supreme Court held that limitations on political campaign contributions were constitutional, but that limitations on independent expenditures generally violated the First Amendment. *Id*. at 58-59. *Buckley* recognized that paying for an expenditure made in cooperation with a campaign was the equivalent of making a contribution to that campaign and therefore could be limited. *Id.* at 46-47 & n.53; *see also* 2 U.S.C. § 441a(a)(7)(B) (coordinated expenditures considered contributions). The two types of expenditures are treated differently because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . undermines the value of the expenditure to the candidate." *Buckley*, 424 U.S. at 47.

As a result, an allegation that merely states that legal services were provided "for the benefit of the Kerry-Edwards Campaign" (Opp. at 5 (quoting AR00092)), does not state a claim of illegal coordination. And a statement that the goal of the ballot challenges was "to help elect John Kerry the next President of the United States" (Opp. at 5 (quoting AR0006-07)), is not evidence of illegality. The first prerequisite for the legal work to constitute a contribution to a candidate is coordination; in other words, it had to have been made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i).[1] Plaintiff does not dispute that coordination must have occurred to constitute a contribution.

[1] Similarly, regarding coordinated expenditures on behalf of political parties, "expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee." 2 U.S.C. § 441a(a)(7)(B)(ii).

Furthermore, the definition of "contribution" under FECA does not include "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee." 2 U.S.C. § 431(8)(B)(i) ("Volunteer Exception"). As a result, the law firms named in the administrative complaint could have made excessive contributions only if the evidence demonstrates that their attorneys were not covered by the Volunteer Exception. If the attorneys were working pursuant to the Volunteer Exception, then neither the firm nor the individual attorneys made an illegal contribution — a principle that plaintiff does not dispute.[2]

Plaintiff repeatedly misstates the law when he argues that an attorney's contribution of legal services can fit the Volunteer Exception only if he takes an unpaid leave of absence from his job. (Opp. at 7-8.) The Volunteer Exception in fact applies to other circumstances in which a lawyer is not compensated for his work. For example, a partner in a law firm can volunteer for a campaign, even during "normal business hours," without taking a leave of absence or having such work constitute a contribution from the law firm to the campaign. FEC Advisory Op. 1979-58, http://saos.nictusa.com/aodocs/1979-58.pdf. This flexibility allows volunteer work as long as the attorney's compensation is not "tied to the number of hours he or she work[ed]" and the attorney has "discretion in the use of his/her time," such that he would not normally have received a "reduction of income . . . [if he] spent less time on firm matters than may have been spent during a previous period." *Id.*; *see also* FEC Advisory Op. 1980-107, http://saos.nictusa.com/aodocs/1980-107.pdf (same). Because most attorneys at law firms

[2] Plaintiff also fails to articulate a theory under which the individual lawyers could have made illegal contributions. As explained previously, the attorneys either were working pursuant to the Volunteer Exception or, if they were compensated, their law firms could have been making contributions. (FEC Mem. at 12). But this does not mean that the individual attorneys would have violated FECA.

receive the majority of their income through salaries, not hourly wages, it is possible for an attorney to volunteer "during normal working hours" (Opp. at 7), yet still complete his normal job responsibilities on other matters for compensation.[3] Thus, even assuming *arguendo* that the accused attorneys volunteered without taking leaves of absence and made use of some firm resources, such evidence would not be the smoking gun that plaintiff believes. (Opp. at 7.)

In sum, plaintiff is incorrect to suggest that the Commission could have cleared up all ambiguities merely by asking law firms whether attorneys were paid "their usual compensation while they worked on the challenges." (Opp. at 8.) As explained further below, the administrative complaint failed to demonstrate that any activity was both coordinated and carried out by employees being compensated for that work.

B. Multiple Respondents Refuted The Allegations of Illegal In-Kind Contributions

The Commission provided notice to the DNC, Kerry Committee, and Ballot Project, Inc., among other respondents, and each of them denied that there was coordination between either the DNC or Kerry Committee and the attorneys bringing ballot challenges. The DNC noted that it was "not a party in any of the ballot access petition challenges." (AR00604.) Although some of the ballot access complaints were filed by individuals who had some association with the DNC such as state Democratic Party chairs (who are automatic members of the DNC), the DNC explained that those filings were made by the individuals "on their own behalf." (AR00605.) The Kerry Committee similarly denied illegal coordination. (AR00598.) The Ballot Project submitted multiple affidavits stating that its representatives "would sometimes speak with lawyers in various states to assess whether a challenge to the ballot qualifications of Mr. Nader

[3] In addition, the concept of "normal working hours" seems to have little application to much of the modern practice of law, particularly for attorneys in private practice. (*See, e.g.*, Opp. (filed at 11:58 p.m.)).

was appropriate under state law" and would "provide publicly available documents or seek to determine if a lawyer was available to assist in a challenge to the ballot qualification of Mr. Nader." (AR01641, AR01644, AR01647, and AR01650.) The affidavits stated that "[t]he Ballot Project did not undertake any of its activities at the direction, request, or suggestion of, or in conjunction or concert with" the Kerry Committee, the DNC, or any state or local entities, and it "acted independently" of all those entities. (AR01641, AR01644, AR01647, and AR01650.)

Nader characterizes these responses as mere denials of "legal conclusions" rather than of facts. (Opp. at 5-6.) But as shown above, both the DNC and the Ballot Project made clear factual statements that the ballot challenges were not coordinated with the DNC or the Kerry campaign. These respondents had first-hand knowledge of their own participation in the relevant events and provided a credible account of those events in which neither the DNC nor the Kerry Committee had direct involvement in the legal challenges. The responses indicate that it was the Ballot Project, not the DNC or Kerry campaign, that contacted attorneys and made arrangements for ballot challenges in various states, without direction from the DNC or Kerry Committee. In contrast to these statements from the actual participants in the relevant events that no coordination took place, the allegations in the administrative complaint were largely based on assumptions, without firsthand knowledge, that a conspiracy must have existed. It is true that the Commission need not have "actual proof" of a violation (Opp. at 7) before treating an entity as a respondent or finding reason to believe a violation has taken place. However, after weighing statements from entities and individuals with direct knowledge of the relevant events against an administrative complainant that can only speculate as to essential facts — and with little to no supporting evidence that would rebut the respondents' denials — it was reasonable for the Commission to allocate its investigative resources elsewhere. This decision was particularly

reasonable because, as explained above, without evidence of coordination between the DNC or Kerry Committee and some other entity alleged to have made prohibited contributions, the foundational prerequisite for all of plaintiff's claims disappears.

C. Aside from Speculation, None of Plaintiff's Purported Evidence Shows Activity That Was Both Coordinated and Compensated by Law Firms

Plaintiff points to several pieces of evidence in the administrative record that purportedly support the claim that the DNC and/or the Kerry Committee accepted illegal in-kind contributions in the form of legal services. But none of the evidence is inconsistent with the possibility that legal work was being done either independently of campaigns or on a volunteer basis by attorneys.

Plaintiff points to two email exchanges which supposedly show coordination with respect to the legal challenges. Plaintiff alleges that the first email indicates that Judy Reardon, described in the administrative complaint as the Kerry Committee Deputy National Director, played a role in the drafting of a New Hampshire ballot challenge complaint. (AR01036.) But as the Kerry campaign explained, the Act permits a campaign to pay staffers to engage in ballot access work itself and also work with attorney volunteers. (AR01854; AR00596-97.) And if such work takes place, that does not mean that subsequent ballot access work by other persons is automatically attributable to the campaign or presumptively a coordinated effort. *See generally* 11 C.F.R. §§ 109.21, 109.37 (defining coordinated communications).

The second email on which plaintiff relies was from Caroline Adler, who is described in the administrative complaint as a DNC employee and Kerry Committee legal team member. The email attaches a script for phone calls to Nader petition signers, presumably for the purpose of obtaining information to use in a ballot challenge. (AR01015-16.) But this email similarly fails to establish that a contribution was made that would be subject to any statutory limits under

2 U.S.C. § 441a(a): the DNC's payment to its own staff to assist with a ballot challenge shows the DNC providing something of value to *someone else*, not the other way around. (AR00602.) For these reasons, the Commission found that the Adler and Reardon emails were not sufficient evidence that the DNC or Kerry Committee had received excessive in-kind contributions, coordinated the ballot challenges, or worked with compensated firm attorneys, despite the fact that the senders of those two emails were affiliated with the DNC and/or Kerry Committee. (AR01838-39; AR01853-54.)

Other evidence relied on by plaintiff also appears to directly contradict the allegation that free legal services were provided to the DNC or Kerry Committee. For example, plaintiff points to the testimony of Dorothy Melanson, Chair of the Maine Democratic Party and plaintiff in the Maine ballot challenge, in which she stated that she had been contacted by the "Democratic Party" and told she would receive financial support for filing a ballot challenge. (AR0961-68.) But she said that she filed the challenge in her own name, "of [her] own volition and will and independent mind." (AR0965.) And her testimony was not that the law firms representing her were donating those services; rather, she testified that the DNC was going to pay her legal bills, although she did not know how much they would pay. (AR0966-68.) Under such an arrangement, the law firms would not *contribute* anything to the DNC; they would be *paid* for their services. As the Commission found, the Melanson testimony at most "suggest[ed] that the DNC may have paid some or all of her legal costs, not that it recruited and obtained free legal services, and it fails to show any link at all to the Kerry Committee." (AR1838.)

Plaintiff also asserts that reports filed by the FEC indicate that four state ballot challenges were filed by law firms that were retained by the DNC, and that some of the ballot challenges were filed by individuals affiliated with the DNC. (Opp. at 3.) Again, this does not suggest that

these firms were providing free legal services to the DNC above the applicable contribution limits; to the contrary, to the extent that the DNC paid for legal services, the work performed was not, by definition, an in-kind contribution. The Commission particularly noted this contradiction with respect to the Reed Smith law firm in Pennsylvania. (AR01851-52, 1854-55 & n.1) (noting that allegations were "contradictory" because they both accused the DNC of paying Reed Smith for the ballot challenges and of Reed Smith providing legal services for free). Evidence that the DNC reimbursed travel expenses for attorneys who worked on the Florida challenge is similarly consistent with those attorneys working pursuant to the Volunteer Exception, because the travel expenses of volunteers can be paid under the applicable regulations. 11 C.F.R. § 116.5(b).

Furthermore, the overlapping connections between lawyers, ballot-access plaintiffs, and individuals associated with the DNC are consistent with the testimony of the Ballot Project's affiants, who specifically sought out attorneys who would provide free legal work.[4] In short, none of the evidence plaintiff points to clearly contradicts the explanations of the respondents. Even if there had been clearer indications that unlawful coordination had taken place, the Commission had the discretion not to pursue it in light of the substantial issues of staleness and statutes of limitations resulting from Nader's almost four-year delay in filing his administrative complaint. (AR01835; *see* FEC Mem. at 14-18.) In essence, plaintiff's argument is that the Commission should have investigated over 50 law firms and nearly 100 individuals because there is (1) contradictory evidence about whether *one* law firm (Reed Smith) paid its attorneys for their ballot access work and (2) some indication that a couple of DNC or Kerry employees

[4] Plaintiff also states that the DNC had an employee named Perry Plumart who was designated the "Nader Coordinator." (Opp. at 3.) But any assistance he may have provided to volunteer attorneys engaged in ballot access challenges would not constitute a violation of the Act. The DNC paid for his time and reported the expenditures for work by law firms. (AR00608.)

may have provided assistance to a couple of other attorneys, who may or may not have been compensated for their work. Nader has failed to show that opening an investigation on such slim and ambiguous evidence was the only reasonable path the Commission could have chosen, as he must to prevail in this action. (*See* FEC Mem. at 5-6.)

II. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN DISMISSING CLAIMS AGAINST THE 527 GROUPS

Plaintiff does not dispute, nor could he, that "[t]he FEC has broad discretionary power in determining whether to investigate a claim, and how, and whether to pursue civil enforcement under the Act." *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010). But plaintiff nevertheless argues that it was an abuse of discretion for the Commission to dismiss the claims brought against the 527 Groups because, in his view, the FEC "exaggerates the potential difficulty of its investigation." (Opp. at 10.) Once again, plaintiff suggests that "[a]ll the Agency had to do, in short, was confirm the authenticity of the evidence submitted with the Administrative Complaint, much of which is available in the public domain." (Opp. at 10.)

The situation was not as simple as plaintiff implies, and the Commission explained reasonable grounds for its decision to dismiss the claims against the 527 Groups. Plaintiff waited almost four years after the alleged illegal conduct took place before filing his administrative complaint. In the intervening time, the organizations had become defunct and inactive, evidence had become stale, and the statute of limitations became imminent. (FEC Mem. at 14-18.) These are reasonable considerations for the Commission when deciding how to allocate its resources. Neither the enforcement provisions in 2 U.S.C. §§ 437g(a)(1)-(6) nor the judicial review provision in 2 U.S.C. §§ 437g(a)(8) require that the Commission attempt to follow every trail whose scent has dissipated, and it is neither Nader's nor the courts' role to "sit as a board of superintendance directing where limited agency resources will be devoted." *FEC v. Rose*, 806

F.2d 1081, 1091 (D.C. Cir. 1986). Plaintiff diminishes his own lengthy delay in bringing an administrative complaint by saying that "the FEC still had 1-1/2 years to confirm the allegations," (Opp. at 11), while ignoring the numerous time-consuming steps that the Commission must undertake before it can seek enforcement of a violation in federal court. (FEC Mem. at 28-29.)

The plaintiffs in *Akins* also claimed that the FEC failed to investigate adequately, but the court there found no merit to their argument because, among other things, they relied on speculation based on old evidence about "what may have turned up in further investigation." 736 F. Supp. 2d at 21. This Court should reach a similar conclusion under the applicable deferential review and hold that the Commission's determination was well within its discretion.

III. THE COMMISSION HAD DISCRETION TO IDENTIFY THE APPROPRIATE RESPONDENTS

A. The Commission Has Discretion to Identify the Appropriate Respondents to an Administrative Complaint

As previously explained (FEC Mem. 18-24), the FEC acted well within its discretion when it determined the appropriate respondents to the administrative complaint. Plaintiff argues that the Commission "conspicuously *fails to cite a single legal authority*" for this proposition. (Opp. at 11 (citing FEC Mem. at 19-24).) But the Commission in fact identified the statutory and regulatory bases for its interpretation of its responsibilities under the Act, as well as some of its administrative history and policy judgments consistent with that interpretation. Identifying the initial targets of a possible investigation is merely one step in FECA's enforcement scheme, *see generally* 2 U.S.C. § 437g(a)(1)-(6), and the Commission cited numerous cases explaining the wide discretion afforded to the agency in allocating its resources. (*See* FEC Mem. at 5-6, 14, 17.) Plaintiff relies on a misleading partial quotation from a single case to suggest that the

Commission lacks such discretion. Plaintiff characterizes *AFL-CIO v. FEC*, as "defining a respondent as 'any person alleged in the complaint to have committed a violation of FECA'" (Opp. at 12 (citing 177 F. Supp. 2d 48, 52 n.4 (D.D.C. 2001))); in fact, the complete quotation states, "A respondent *may be* any person alleged in the complaint to have committed a violation of FECA." 177 F. Supp. 2d at 52 n.4 (emphasis added). Plaintiff thus cites no case calling into question the Commission's discretion with respect to the Commission's determinations regarding who should formally be deemed respondents.

Nader criticizes the Commission's use of comments from a 2003 public hearing (Opp. at 2, 11-12), but he misunderstands why those comments are relevant. They are not legal authority, but they rebut the suggestion that the Commission acted arbitrarily and capriciously in this instance. The 2003 public hearing demonstrates that the Commission has given issues of notice to respondents a great deal of consideration over for a number of years, has established a practice of naming official respondents with the great care it deserves, and made decisions in this administrative matter consistent with the policies it has developed over time with comment from the public.[5]

B. Even if the Commission Had Erred By Failing to Provide Notice, the Error Would Have Been Harmless

Even if FECA required notice to every person alleged in an administrative complaint, no matter how over-inclusive and harassing complaints may get, the Court should still find any error in this case harmless. In *FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 90 (D.D.C. 2006), the court similarly examined an administrative complaint in which the FEC had allegedly failed to give proper notice to a respondent. The court found that there was a "notice defect," but then

[5] The fact that the Kerry Committee's counsel was one of the commenters in 2003 did not affect the Commission's determination in this case, as the Kerry Committee was treated as a respondent.

analyzed the error pursuant to the Administrative Procedure Act's "harmless error" doctrine, which "tempers judicial consideration of challenges to preliminary, procedural, or intermediate agency action." *Id.* at 90-91 (quoting *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998)) (internal quotation marks omitted). The court determined that the error constituted harmless error because of a likely lack of prejudice. *Club for Growth*, 432 F. Supp. 2d at 90-91.

In applying the APA's harmless error doctrine, courts take an outcome-determinative approach and examine whether the procedural error contributed to the agency's conclusion. *See, e.g., City of Portland v. EPA*, 507 F.3d 706, 716 (D.C. Cir. 2007) (holding that it was harmless error for EPA to use flawed science in its regulation because it did not change the agency's ultimate determination); *Steel Mfrs. Ass'n v. EPA*, 27 F.3d 642, 649 (D.C. Cir. 1994) (holding that agency errors are harmless "when a mistake of the administrative body is one that clearly had no bearing . . . on the substance of the decision reached" (quoting *Chemical Mfrs. Ass'n. v. EPA*, 870 F.2d 177, 202 (5th Cir.1989)). Here, as we have explained (FEC Mem. at 30), and as the plain language of 2 U.S.C. § 437g(a)(1) suggests, the primary purpose of the notice requirement is to provide an opportunity for those accused of violating the Act a chance to defend themselves if the Commission is not going to simply dismiss the complaint against them. Nader offers no basis for assuming that, if the would-be respondents had taken advantage of that opportunity, it would have strengthened the case against them.

CONCLUSION

For the foregoing reasons, the Commission's Motion for Summary Judgment should be granted and plaintiff's should be denied.

Respectfully submitted,

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