IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEVEL THE PLAYING FIELD, PETER ACKERMAN, GREEN PARTY OF THE UNITED STATES, and LIBERTARIAN NATIONAL COMMITTEE, INC. Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	Civil Action No.: 15-cv-1397 (TSC)

PLAINTIFFS' PARTIAL OPPOSITION TO DEFENDANT'S MOTION FOR CLARIFICATION, RECONSIDERATION, AND/OR PARTIAL EXTENSION OF TIME, AND MOTION FOR CLARIFICATION OR RECONSIDERATION

Plaintiffs oppose, in part, the FEC's motion for clarification, reconsideration, and/or a partial extension of time to comply with the Court's recent Order granting summary judgment to Plaintiffs. Plaintiffs separately request that the Court clarify or modify its Order to expressly retain jurisdiction to adjudicate any challenge to the FEC's decision on remand.

In its Memorandum Opinion, the Court determined that the FEC applied an erroneous legal standard, ignored the vast majority of the evidence, and failed to engage in reasoned decision-making when it dismissed Plaintiffs' administrative complaints. (Dkt. 60 ("Mem. Op.") at 13-14, 17-19, 22-23). Accordingly, the Court issued an Order requiring the FEC "to reconsider the evidence and allegations and issue a new decision consistent with [the Court's] Opinion" within thirty days. (Dkt. 61 ("Order")).[1]

[1] The Court also determined that the FEC's denial of Plaintiffs' petition for rulemaking was arbitrary and capricious and ordered the FEC to issue a new decision within sixty days. (Dkt. 60 at 27-28; Dkt. 61).

It is Plaintiffs' understanding that the Order requires the FEC to issue a new decision within 30 days evaluating whether there is "reason to believe" that FECA violations have occurred. Plaintiffs therefore do not oppose the FEC's request for clarification that the Order does not impose a 30-day deadline for conclusion of the entire enforcement matter against the CPD and its directors. (Dkt. 62 ("FEC Mot.") at 1-3, 8-9).

By contrast, the FEC's requested modifications of the Order are largely unwarranted. The FEC asks the Court to impose no deadline whatsoever for its reason-to-believe determination, and merely require the FEC either to appeal or to reopen the administrative complaints within 30 days. (Dkt. 62-1 (proposed order); FEC Mot. at 11-12). This request is unreasonable and should be rejected.

Alternatively, the FEC requests an additional thirty days to make its reason-to-believe determination. (FEC Mot. at 3, 8-12). Most of the FEC's proffered reasons for this request are implausible. However, if the Court deems it appropriate, Plaintiffs would consent to an extension of no more than thirty days in order to accommodate the additional respondents whom the FEC has thus far failed to notify of the administrative complaints.

In addition, Plaintiffs request that the Court retain jurisdiction so that if the FEC again dismisses the administrative complaints in a manner contrary to law, Plaintiffs may promptly file another challenge to that decision in this docket. This procedure is routine, and it would avoid unnecessary delay and expense for all concerned.

I. The FEC Should Be Required To Make Its Reason-To-Believe Determination Within No More Than Sixty Days

The FEC's suggestion that it should not be required to reconsider its reason-to-believe determination by any specific date is unjustified and should be swiftly rejected. The FEC cites no case supporting such an anemic remedy for the arbitrary and capricious dismissal of an

administrative complaint. In fact, both the FECA and the relevant case law suggest that a thirty-day deadline for reconsideration is routine and appropriate.

The FECA provides that once the Court "declare[s] that the [FEC's] dismissal of [an administrative] complaint . . . is contrary to law," it "may direct the [FEC] to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(C). For the FEC to "conform" with a declaration that its dismissal of a complaint was contrary to law, the FEC must rectify the error by issuing a new decision. If the FEC merely reopens the complaint, but does not issue a new decision, the Court has no assurance that the FEC will in fact "conform" with the Court's instructions to engage in a legally sound and thorough analysis of the complaint.

The nature of the FEC's new decision depends on the stage at which the administrative complaint was dismissed. Here, the FEC dismissed Plaintiffs' complaints because it found no reason to believe that FECA violations had occurred. We therefore agree with the FEC that it cannot "leapfrog" the reason-to-believe determination and proceed straight to a vote on probable cause, without the investigation and briefing required by statute. *Hagelin v. Fed. Election Comm'n*, 332 F. Supp. 2d 71, 82 n.20 (D.D.C. 2004), *rev'd on other grounds and remanded*, 411 F.3d 237 (D.C. Cir. 2005); *see also* 52 U.S.C. § 30109(a)(1)-(4).[2] Nothing in the FECA, however, prohibits the FEC from revisiting the initial reason-to-believe determination within thirty days and issuing a new decision.

On the contrary, a thirty-day deadline is both ordinary and expected. The D.C. Circuit has suggested as much. In *Crossroads Grassroots Policy Strategies v. Federal Election*

[2] For this reason, Plaintiffs did not interpret the Court's Order as requiring the FEC to conclude its entire enforcement matter within thirty days.

Commission, 788 F.3d 312 (D.C. Cir. 2015), the Court explained: "[w]hen a court declares the Commission's dismissal contrary to law, the Commission has 30 days to 'conform [its] declaration.' But . . . the Commission may reach the same outcome relying on a different rationale." *Id.* at 315 (alteration in original) (quoting 52 U.S.C. § 30109(a)(8)(C)). Moreover, several courts have required the FEC to produce reasoned decisions within thirty days. *See Common Cause v. Fed. Election Comm'n*, 729 F. Supp. 148, 153 (D.D.C. 1990) (ordering the FEC to reconsider its probable cause determination "within 30 days");[3] *Common Cause v. Fed. Election Comm'n*, No. CIV.A. 86-3465 JHP, 1988 WL 66206, at *5 (D.D.C. June 15, 1988) (ordering the FEC to "reconsider plaintiff's administrative complaint" and "furnish [a new explanation] to plaintiff and this court" within "thirty days"); *Antosh v. Fed. Election Comm'n*, 599 F. Supp. 850, 856 (D.D.C. 1984) (finding that "there is no basis in this record not to find a violation" of FECA and ordering the FEC to conform within 30 days); *cf. Common Cause v. Fed. Election Comm'n*, 489 F. Supp. 738, 745 (D.D.C. 1980) (ordering the FEC to "institute a civil action for relief" if it did not execute the conciliation agreements being negotiated "within 30 days").

Here, too, thirty days is ample time for the FEC to reconsider the administrative complaints and issue a new reason-to-believe decision. On September 19, 2016, another court found that the FEC's dismissal of administrative complaints at the reason-to-believe stage was contrary to law, and ordered the FEC to conform within thirty days. *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, No. 14-cv-01419 (CRC), 2016 WL 5107018, at *1, *3, *12 (D.D.C. Sept. 19, 2016) ("*CREW*"). Unsurprisingly, the FEC was

[3] *See also Hagelin*, 332 F. Supp. 2d at 82 n.20 (explaining that "[t]he court in *Common Cause* ordered the FEC to find probable cause"); *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 761 F. Supp. 813, 815 (D.D.C. 1991) (enforcement action filed as a result of *Common Cause*; explaining that the FEC issued a new probable cause decision within 30 days), *rev'd on other grounds*, 966 F.2d 1471 (D.C. Cir. 1992).

able to reconsider and issue a new decision by October 19. *See CREW*, No. 14-cv-01419, ECF No. 57-1 (cover letter transmitting FEC decision), ECF No. 57-2 (nineteen-page statement of reasons).

The FEC's arguments for an extension of time are largely meritless. The FEC argues that if it is forced to reconsider its reason-to-believe decision within thirty days, it may moot the appeal it is purportedly considering. (FEC Mot. at 8). But it should not take the FEC more than a few days to decide whether to pursue an appeal. The issues on appeal would be precisely the same as those litigated on summary judgment, and the Court of Appeals would apply precisely the same standard of review. *See Hagelin v. Fed. Election Comm'n*, 411 F.3d 237, 242 (D.C. Cir. 2005). The FEC has therefore already engaged in the legal analysis required to assess whether an appeal is viable. Moreover, the FEC can take preparatory steps toward issuing a new decision—such as notifying the additional respondents and reevaluating Plaintiffs' evidence—without mooting a potential appeal. The FEC's reconsideration of its reason-to-believe determination and its assessment of whether to appeal can therefore proceed in tandem.

The FEC further argues that if it "accepts the remand and ultimately finds reason to believe, it would not be able to issue its reason-to-believe decision publicly within 30 days" because "FECA requires all of this activity to be conducted confidentially." (FEC Mot. at 9 n.2). The FEC has, however, encountered this situation before. In *CREW*, after the thirty-day period expired, the plaintiff moved for an order to show cause requiring the FEC to explain why it had issued no decision on one of the two complaints. The FEC moved for a protective order allowing it to file a redacted explanation, which the court granted. *See CREW*, No. 14-cv-1419, ECF No. 62 (FEC motion), ECF No. 63 (order granting motion). The FEC will not be held in contempt simply because it must abide by the FECA's confidentiality obligations.

The FEC also contends that thirty days is insufficient time to review Plaintiffs' "voluminous allegations and evidentiary submissions." (FEC Mot. at 11). But the FEC was in possession of this material for *nearly a year* before ruling on Plaintiffs' administrative complaints, and the FEC issued that decision only after Plaintiffs sued it for unreasonable delay pursuant to 52 U.S.C. § 30109(a)(8)(A). (Dkt. 25 ¶¶ 88, 99-101). The FEC's claim that it needs additional time is proof that either (a) the FEC failed to review this evidence before issuing its initial decision, or (b) the FEC reviewed the evidence but deliberately disregarded it. Having behaved in this manner, the FEC should not be permitted to prolong the process any further.[4] If the FEC cannot fulfill its duties, then Plaintiffs should be allowed to file a civil action in its own name against the CPD and its directors for FECA violations. *See* 52 U.S.C. § 30109(a)(8)(C).

Correcting these violations is an urgent matter even though the presidential debates are "more than three and a half years away." (FEC Mot. at 11). For a change in the CPD's debate rules to have any meaningful effect, it must occur far in advance of the debates themselves. Potential independent candidates must begin fundraising and seeking ballot access long before the general election debates, and they have little incentive to do so while it is virtually guaranteed that they will be excluded from those debates. Even Vice President Joe Biden concluded in October 2015—nearly a year before the 2016 general election, and several months before the first primaries—that it was too late to mount a presidential campaign.[5]

The only issue raised by the FEC that warrants consideration is the fact that the FEC must notify the additional respondents of Plaintiffs' allegations and allow them fifteen days to

[4] *Cf. Citizens for Percy '84 v. Fed. Election Comm'n*, No. CIV.A. 84-2653, 1984 WL 6601, at *4 (D.D.C. Nov. 19, 1984) (observing that "the Commission's casual handling of this matter is highlighted by the fact that the Commission's finding of reason to believe was not made until . . . more than five months after the complaint was filed," and finding that "[s]uch dilatory conduct . . . cannot be condoned if the statute is to have any meaning").

[5] Peter Baker & Maggie Haberman, *Joe Biden Concludes There's No Time for a 2016 Run*, N.Y. Times, Oct. 21, 2015, https://www.nytimes.com/2015/10/22/us/joe-biden-concludes-theres-no-time-for-a-2016-run.html?_r=0.

respond. (FEC Mot. at 10). To be clear, all of this could take place within the thirty-day window set by the Court, and the FEC's negligence and procedural violations are wholly responsible for the predicament of these respondents. (Mem. Op. at 18-19). Plaintiffs acknowledge, however, that these respondents may need more than the minimum fifteen days to respond to the allegations against them, and that the current schedule may make it difficult for the FEC to accommodate their requests for more time. Accordingly, Plaintiffs would consent to an extension of the Order's thirty-day deadline by no more than thirty days if the Court, in its discretion, deems it appropriate.

II. The Court Should Expressly Retain Jurisdiction To Consider Any Challenge To The FEC's Decision On Remand

If the FEC again decides that there is no reason to believe that the CPD and its directors have violated the FECA, Plaintiffs may again be in a position to challenge the dismissal of their complaints as contrary to law. Consequently, Plaintiffs request that the Court clarify or modify its Order to expressly retain jurisdiction to adjudicate any such challenge. If the Court instead treats the action as closed, Plaintiffs will be required to file a new action. The action would be designated as related and would likely be assigned to this Court, but this process would entail unnecessary delay and expense.

In analogous situations, courts presiding over administrative matters have retained jurisdiction to review the decisions issued after remand to the agency. *See, e.g.*, *Banner Health v. Burwell*, 126 F. Supp. 3d 28, 105 (D.D.C. 2015) (retaining jurisdiction pending remand to the agency to provide further explanation regarding an aspect of its rulemaking); *Shays v. Fed. Election Comm'n*, 511 F. Supp. 2d 19, 22-24 (D.D.C. 2007) (after the FEC on remand issued a "revised explanation and justification" for its decision to decline to initiate a rulemaking, the court considered the plaintiff's "motion for further relief" and the FEC's renewed motion for

summary judgment, which concerned whether the "new explanation also violates the APA"); *Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 123-25 (D.D.C. 2006) (remanding to agency to further explain its decision, and retaining jurisdiction to set a briefing schedule once the agency completed its evaluation and supplemented the administrative record); *Kean for Cong. Comm. v. F.E.C.*, No. CIV.A. 04-0007JDB, 2005 WL 354484, at *2 (D.D.C. Feb. 15, 2005) (granting FEC's motion for a remand to reconsider its decision, and setting a status conference to determine a briefing schedule following disposition of the remand); *Common Cause*, 1988 WL 66206, at *5 (remanding to FEC to reconsider dismissal of administrative complaint within 30 days, and retaining jurisdiction to evaluate the FEC's reconsidered decision).

Plaintiffs respectfully submit that a similar disposition is appropriate here. Pursuant to Local Civil Rule 7(m), we have conferred with the FEC, which informs us that it has not yet taken a position but will promptly respond to Plaintiff's motion.

CONCLUSION

For the foregoing reasons, the Court should deny the FEC's motion except insofar as it seeks an extension of no more than thirty days to issue a new reason-to-believe decision. In addition, Plaintiffs request that the Court retain jurisdiction to adjudicate any challenge to that decision.

Dated: February 9, 2016
New York, New York

Respectfully submitted,

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