UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	:	Civil No. 10-989-BAH

PLAINTIFF'S OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Ralph Nader ("the Candidate") submits this Opposition to the Motion for Summary Judgment ("FEC Mem.") filed by Defendant Federal Election Commission ("FEC" or "the Agency") on February 23, 2011.

I. COUNTERSTATEMENT OF FACTS

Pursuant to LCvR 7(h)(2) (as amended September 2, 2008), the Candidate incorporates by reference herein, and in his Memorandum of Points and Authorities in Support of Motion for Summary Judgment, the Statement of Material Facts as to Which There Is No Material Dispute, which was filed on January 21, 2011.[1]

II. THE AGENCY'S DISMISSAL OF THE ADMINISTRATIVE COMPLAINT WAS CONTRARY TO LAW

The FEC's position in this case is summed up by the faulty argumentation set forth in its opening paragraph, which recurs like a chorus throughout its filing. FEC Mem. at 7. First, the FEC asserts, generally and without factual support, that the allegations in the Administrative

[1] The FEC also objects to the Candidate's reliance on "rulemaking" cases, on the ground that they are "inapplicable," but those cases apply the same "arbitrary or capricious" standard that applies in this case, and they are no less applicable simply because the agency action involves rulemaking rather than an enforcement action.

Complaint are too "speculative" to warrant investigation; next, the FEC draws a conclusion of fact that directly contradicts evidence in the record; and finally, disregarding the clear conflict between its conclusion and the evidence, the FEC contends that the Court should defer to its "broad discretion" in this matter. But the FEC does not have "discretion" to contradict or disregard evidence in the record. On the contrary, in cases such as this, where the Agency's "decision is not supported by substantial evidence," reversal is proper. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (quoting *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986)).

Reversal is also proper in this case because the FEC violated the express terms of the Act and the mandatory language of its own regulations by delaying service of the Administrative Complaint upon certain Respondents for several months, and by completely failing to serve most others. Pl. Mem. of Points and Auth. in Supp. of Mot. for Sum. J. ("Pl. Mem.") at 6-8. The FEC does not dispute this fact, FEC Mem. at 3-4 & n.4, but insists that it had "discretion" to violate the Act and its own mandatory regulations – a self-contradictory proposition for which the Agency conspicuously cites no legal authority. FEC Mem. at 18-32. Instead, the FEC relies upon "input from the regulated community," including the comments of Kerry-Edwards 2004's own counsel. FEC Mem. at 21-22. Because such "input" neither abrogates the express terms of the Act nor rescinds the Agency's mandatory regulations, however, the FEC's delay and failure in serving the Administrative Complaint was contrary to law. *See American Fed. of Labor v. FEC ("American Fed. of Labor II")*, 333 F.3d 168, 170 (D.C. Cir. 2003)

A. The FEC's Conclusion That the Administrative Complaint Provides "No Reason to Believe" That Respondents Violated the Act as Alleged in Count 1 Is Contrary to Law Because It Contradicts Evidence in the Record.

1. The FEC Disregards Evidence in the Record Demonstrating That Respondents' Ballot Challenge Proceedings Were Coordinated With the DNC and Kerry Committeee.

The FEC concedes that Count 1 of the Administrative Complaint relies on a "viable theory, namely that spending by corporate law firms to remove a candidate from the ballot may constitute prohibited contributions." FEC Mem. at 8-9. But, the Agency asserts, the allegations supporting this theory are "speculative…because they assumed without any evidence that the legal challenges were coordinated with the DNC and/or the Kerry Committee." FEC Mem. at 8 (emphasis added). This conclusion of fact is demonstrably false, because it directly contradicts several pieces of evidence in the record, including but not limited to the following:

- On September 12, 2004, Judy Reardon, Kerry-Edwards 2004's Deputy National Director for Northern New England, sent an email to DNC official and New Hampshire Democratic Party Chair Kathleen Sullivan and attorneys Martha Van Oot and Emily Gray Rice, with a complaint against Nader-Camejo 2004 attached, which Reardon personally drafted, and which Attorneys Van Oot and Rice filed with the New Hampshire Ballot Law Commission in Sullivan's name, AR00049, AR00064, AR00164-75;

- On September 17, 2004, DNC employee and Kerry-Edwards 2004 legal team member Caroline Adler sent DNC staffers an email with an attached document, entitled "Script for Nader Petition Signers," which provided instructions for contacting voters who signed Nader-Camejo nomination petitions, in order to prepare challenges to the petitions, AR00048-49;

- In a hearing before the Maine Bureau of Corporations, Elections and Commissions on August 30-31, 2004, DNC official and Maine Democratic Party Chair Dorothy Melanson testified under oath that DNC officials had directed her to challenge the Nader-Camejo 2004 Maine nomination petitions, and that the DNC was paying her expenses, including attorneys' fees, AR00048;

- Reports on file with the FEC confirm that the DNC retained not only the law firm that filed Respondents' challenge in Maine, but also the law firms that challenged Nader-Camejo nomination petitions in Mississippi, Ohio and Pennsylvania, and that the DNC reimbursed travel expenses for attorneys who challenged Nader-Camejo nomination petitions in Florida, AR00048;

- No fewer than 10 DNC officials directly participated in proceedings challenging Nader-Camejo 2004 nomination petitions nationwide, with at least six initiating the proceedings in their own names, and the DNC also employed a full-time "Nader Coordinator," Perry Plumart, during the 2004 election, AR00047;

- The Reed Smith Respondents claimed to be working on their challenge free of charge, but campaign finance reports on file with the FEC indicate that the DNC paid Reed Smith $136,142 in "political consulting" and "legal consulting" fees in October and November of 2004, AR00083;

- Reed Smith's managing partner stated that firm's pro bono committee made the decision to allow firm lawyers to represent the parties who filed Respondents' Pennsylvania challenge, and to bill the case as a pro bono matter," AR00050 & n.92, AR00092 & n.172;

- Reed Smith attorneys reportedly spent at least 1,300 hours preparing Respondents' Pennsylvania challenge, which the firm billed as "charity," without charging any client, AR00050 & n.92;

- Respondent Efrem Grail, a Reed Smith partner in charge of Respondents' Pennsylvania challenge, stated that the value of the legal services his firm "gave away" in connection with Respondents' Pennsylvania challenge is $1 million, AR00619;

- In July 2008, a Grand Jury investigation revealed that Pennsylvania state employees had illegally prepared Respondents' Pennsylvania challenge at taxpayer expense, for the benefit of the Kerry Committee, leading the Pennsylvania Attorney General to charge 12 defendants – including the now-convicted Mr. Veon – with numerous felony counts of criminal conspiracy, theft and conflict of interest, AR000609-620; AR000625-626; AR000679-682;

Although by no means exhaustive, this list is more than sufficient to demonstrate that, contrary to the FEC's conclusion, the record contains ample evidence that both Kerry-Edwards 2004 and the DNC not only "coordinated," but also directed and actively participated in Respondents' nationwide effort to challenge Nader-Camejo 2004 nomination petitions. The record contains compelling evidence, including Respondents' own email records, sworn admissions, campaign finance reports, and court documents demonstrating their participation in the alleged conduct. Not once in its 40-page filing, however, did the FEC even attempt to address the foregoing evidence, much less to justify its contradictory conclusion.

Instead, the FEC asserted that it was "impossible to conclude" that the Respondents named in Count 1 "committed any unlawful conduct," because the Administrative Complaint did

not specify "which firms allegedly provided free services or to whom." FEC Mem. at 9. But as the Candidate has already demonstrated, that too is incorrect. Pl. Mem. at 13. The Administrative Complaint specifically identifies by name each Respondent law firm that "provided their legal services for the benefit of the Kerry-Edwards Campaign." AR00092. Allegations regarding these law firms was supported not only by the above-cited evidence, but also by numerous other facts, including several explicit admissions by Respondents and their allies, such as the following:

> "We are being completely open about our intentions. Our goal is to help elect John Kerry the next President of the United States."

AR00006-07; AR00043-52. Once again disregarding the contradictory evidence, the FEC simply repeated its mantra: the Candidate's allegations are "too speculative to warrant an investigation," the Agency concluded, because the Administrative Complaint "merely assumed that the legal challenges were coordinated with the DNC and Kerry Committee." FEC Mem at 9.

When the FEC finally purports to address the evidence in the record, it studiously avoids addressing the bulk of the evidence in the record, FEC Mem. at 11, and instead attempts to distinguish other evidence in the record as mere "overlapping connections" between Respondents, FEC Mem. at 11, while disregarding the above-cited evidence on which the Administrative Complaint principally relies, the FEC all but concedes that its conclusion cannot be reconciled with such evidence.

Anticipating the flaw in its position, the FEC goes to considerable lengths to establish that it properly relied upon Respondents' "direct refutation" of the allegations in the Administrative Complaint. FEC Mem. at 9-11. As an initial matter, however, the FEC confuses Respondents' mere denial of *legal conclusions* for their supposed "refutation" of *facts*. FEC Mem. at 11. For example, the Agency accepts at face value the DNC's assertion that it "did not receive and fail to report any in-kind legal services," as well as the Kerry Committee's assertion

that its conduct "simply does not constitute a violation of the Act." FEC Mem. at 10. But these are conclusions of law and, contrary to the FEC's assumption, they do not "refute" the factual allegation, supported by the above-cited evidence, that the DNC and the Kerry Committee coordinated with Respondents. FEC Mem. at 11.

The FEC concedes that its disposition of this entire matter "hinged largely upon" its demonstrably false conclusion that the record contains no evidence of coordination between the DNC, Kerry Committee and the other named Respondents. FEC Mem. at 25. Indeed, the FEC expressly finds, on the basis of this false conclusion, that "necessarily…neither the law firms and lawyers, nor SEIU, had given the Kerry Committee illegal contributions." FEC Mem. at 32. Because the FEC's factual premise is demonstrably false, however, the Agency's legal conclusion is "not supported by substantial evidence in the record," and it is therefore contrary to law. *Hagelin*, 411 F.3d at 242 (quoting *Orloski*, 795 F.2d at 161).

2. The FEC Disregards Evidence in the Record Demonstrating That Respondent Attorneys Were Compensated for Their Work.

Returning to a familiar refrain, the FEC asserts that the allegations on which Count 1 relies are "also speculative" because the Administrative Complaint contains no "supporting information" that Respondent law firms paid their attorneys for working on the challenges, and therefore "assume[s] that the Volunteer Exception did not apply." FEC Mem. at 8, 12. But as the Administrative Complaint itself clarifies, the Volunteer Exception would apply in this case "only if the attorneys received no compensation for the services rendered." AR00005 (citing 2 U.S.C. 431(8)(B)(i)). By contrast, if the attorneys received "the usual compensation from their employer law firms while providing such services," they are "not volunteers but paid employees," and the exception does not apply. AR00005 (citing 2 U.S.C. 431(8)(B)(ii)).

The FEC does not dispute the foregoing analysis, but contends that the Volunteer Exception still might apply in this case, because the Administrative Complaint "presented no evidence" that the law firm Respondents "compensated their attorneys who worked on the ballot challenges." FEC Mem. at 12. That is incorrect. The Administrative Complaint specifically alleges that only one out of 95 Respondent lawyers claimed to have taken an unpaid leave of absence, whereas the other 94 attorneys "provided their legal services for the benefit of the Kerry Campaign during normal working hours," and "apparently received normal compensation from their law firm employers." AR00085; AR00092. Further, these attorneys' "use of firm resources, including office space, support staff, computers, equipment, supplies and related materials" constitutes evidence that they did not take leave from their firms while working on the challenges, and therefore that the Volunteer Exception does not apply. AR00005. The FEC's dismissal of such evidence as "allegations of illegal contributions of office supplies" only confirms that the Agency failed to consider its relevance as tending to prove that Respondent law firms made millions of dollars in unlawful and unreported contributions and expenditures for the benefit of the Kerry Committee. FEC Mem. at 13 n.7; AR00090-93.

In this case, moreover, the FEC contends that it properly found no reason to believe that the violations alleged in Count 1 occurred, FEC Mem. at 12-13, without even serving the Administrative Complaint upon the parties principally involved in the conduct constituting the violations – *i.e.*, the law firm, lawyer and state Democratic Party Respondents. AR00093. The FEC does not and cannot dispute that its failure to serve these Respondents violated the express terms of the Act and the mandatory language of its own regulations. Pl. Mem. at 6-8. The FEC's contention is also contrary to law because it improperly imposed a burden of actual proof as a prerequisite to service of the Administrative Complaint upon the foregoing Respondents. *See*

generally, *American Fed. of Labor II"*, 333 F.3d at 170 (following filing of complaint Agency "*must first notify the alleged violator* and give it an opportunity to respond" before finding "reason to believe," conducting investigation, and thereafter finding "probable cause") (emphasis added).

According to the FEC, because the Administrative Complaint provided "no evidence" that Respondent attorneys received compensation for working on the challenges, the Agency was "not required to assume the worst and find reason to believe" that they violated the Act. FEC Mem. at 13. But the Agency has it backwards. The issue is not that the FEC was required to find "reason to believe," but only that it was required to serve the Administrative Complaint upon the relevant Respondents before making that finding. *See American Fed. of Labor II*, 333 F.3d at 170. By finding no reason to believe without even serving those Respondents, the Agency assumed – contrary to evidence in the record, AR00005, AR00085, AR00092 – that 94 Respondent attorneys took unpaid leaves of absence, when not one of them claims to have done so.

Finally, the FEC's ominous prediction that complying with its statutory duty in this case would necessarily be "an enormous and resource-draining undertaking" is premature at best. FEC Mem. at 13. Because the FEC concedes that the allegations in Count 1 rely on a "viable theory," FEC Mem. at 8, and because the Administrative Complaint includes ample evidence of coordination among Respondents, which the Agency improperly disregarded, *see supra* Part II.A.1, it is possible and even likely that the FEC could have confirmed the violations in Count 1 had it properly served the Administrative Complaint upon Respondent law firms and sought their response to the following question: Did this firm pay Respondent attorneys their usual compensation while they worked on the challenges? If so, the FEC concedes, such payments

would be an unlawful and unreported corporate in-kind contribution.[2] FEC Mem. at 12 (citing Advisory Opinion 2006-22) (value of legal services law firm provides on behalf of campaign committee in court case addressing ballot eligibility of another candidate is in-kind contribution); *see* FEC AO 1980-57 (funds solicited by Democratic Party to finance candidate's litigation challenging opponent's ballot access are campaign contributions); FEC AO 1983-37 (funds are campaign contributions if used "to initiate legal action to remove an identified candidate from the ballot"); *see also* FEC MUR 5509, Gen. Cnsl. Rep. 4-6 (Feb. 24, 2005) (expenditures in connection with challenges to Nader-Camejo nomination papers are "qualified campaign expenses" on behalf of the Kerry-Edwards 2004 campaign committee).

On the other hand, if the law firm Respondents declined to answer the question, or answered in the negative (a factual representation subject to penalty of perjury), those responses would also be probative. By failing to serve these Respondents and ask the question, however, or to conduct any investigation whatsoever, the FEC adopted a 'see no evil, hear no evil' strategy of willful disregard for evidence in the record. The Agency's action was therefore contrary to law. *See Hagelin*, 411 F.3d at 242 (citing *Orloski*, 795 F.2d at 161).

B. The FEC's Dismissal of the Administrative Complaint Against the Section 527 Respondents Was an Abuse of Discretion.

The FEC contends that it properly exercised its "prosecutorial discretion" in dismissing the Administrative Complaint against the Section 527 Respondents, and even suggests that its "decision not to prosecute or enforce" is a matter of "absolute discretion." FEC Mem. at 14 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). But the Supreme Court has distinguished *Heckler* in cases arising under FECA, which "explicitly indicates" that the FEC's enforcement

[2] The FEC finds it "unclear" whether the individual Respondent attorneys – as opposed to Respondent law firms – could have made illegal contributions or expenditures, FEC Mem. at 12, but any violation by a Respondent firm would necessarily result from the Respondent attorneys' conduct, which thereby may constitute a violation.

decisions shall be subject to judicial review. *See FEC v. Akins*, 524 U.S. 11, 26 (1998) (citing 2 U.S.C. § 437g(a)(8)(A)). Further, in such cases, the FEC concedes, reversal is appropriate where the Agency's "investigation was so inadequate as to constitute an abuse of discretion." FEC Mem. at 15 (quoting *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010)). In other words, the FEC must supply "reasonable grounds" for its decision. *Akins*, 736 F. Supp 2d at 21.

The FEC asserts two related grounds for its decision to dismiss the Administrative Complaint against the Section 527 Respondents. First, the Agency contends that any investigation would be "exceedingly difficult," because the organizations are "defunct". FEC Mem. at 15. And second, the Agency asserts that the "staleness" of evidence would hinder its ability to conduct an investigation within the 5-year limitations period. FEC Mem. at 15-18. Once again, however, the FEC exaggerates the potential difficulty of its investigation.

The allegations setting forth the violations by the Section 527 Respondents are detailed and well-documented. AR00008-20, AR00095-98. To the extent possible, particular violations are individually itemized, with citations to supporting evidence such as Internal Revenue Service Records. AR00014-19. Moreover, the FEC does not dispute that these allegations also rely on a viable legal theory – *i.e.*, that if proven, the allegations would constitute violations of the Act. FEC Mem. 14-18. All 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.

Instead, due to an "administrative oversight," the FEC failed even to serve the Administrative Complaint upon the Section 527 Respondents for several months, AR00729, then waited nearly two years to dismiss the matter, without conducting any investigation, on the ground that the "age of the alleged violations would create problems of proof." AR01813. Now,

the Agency asserts, *the Candidate* is "at least partially responsible" for its failure to investigate, because he filed the Administrative Complaint 3-1/2 years into a 5-year statute of limitations.[3] FEC Mem. at 16. Yet the FEC still had 1-1/2 years to confirm the allegations and authenticate the evidence in the Administrative Complaint. It simply made no effort to do so – even though the Section 527 Respondents Uniting People for Victory, United Progressives for Victory, the National Progress Fund and Americans for Jobs did not even bother to respond. FEC Mem. at 4.

In sum, the FEC fails to offer any reasonable ground for its failure to investigate the specific, well-documented allegations against the Section 527 Respondents. Its dismissal of the Administrative Complaint against these Respondents was therefore an abuse of discretion.

C. The FEC's Failure to Serve the Administrative Complaint on a Majority of Respondents Was Contrary to Law.

Not until the end of its brief does the FEC address the threshold issue of its failure to serve a majority of Respondents in this matter, FEC Mem. at 18-32, and even then, it fails to address the fact that such failure violated the express terms of the Act and the mandatory language of its own regulations. Pl. Mem. at 6-8. Instead, the FEC asserts that it has "discretion" to commit such violations, but conspicuously fails to cite a single legal authority for this self-contradictory claim. FEC Mem. at 19-24. Lacking any legal support for its position, the FEC relies upon "input from the regulated community," including the comments of Kerry-Edwards 2004's own counsel. FEC Mem. at 21-22. But such "input" neither abrogates the express terms of the Act nor rescinds the Agency's mandatory regulations, and it cannot justify the Agency's failure to serve the Administrative Complaint, which was contrary to law. *See In Re Carter-Mondale Reelection Committee*, 642 F.2d 538 (D.C. Cir. 1980) ("Within five days of receiving a

[3] The FEC also complains that the Candidate filed the second supplement to the Administrative Complaint in January 2010, but disregards the fact that it was prompted by the Pennsylvania Attorney General's ongoing criminal

complaint, the FEC is required to notify, in writing, any person alleged to have committed a violation").

The FEC begins its discussion by asserting that the Act and regulations permit it to dismiss a complaint without obtaining a response, and that it has previously done so. FEC Mem. at 19 (citing MUR 6158 (Harpo Inc., et al.)). But MUR 6158 involved a clearly defined statutory exception – the "media exemption" – which allows for dismissal where alleged violations arise from media activity as defined by 2 U.S.C. § 431(9)(B)(i). *See* Gen. Cnsl. Rep., MUR 6158 (Harpo Inc. et al.), Jan. 16, 2009, at 1 n.1 (recommending dismissal where alleged violation arose from candidate's appearance on television show). That exception is wholly inapplicable here.

The FEC next attempts to establish that it has "discretion" to determine the proper respondents to an administrative complaint, primarily on the ground that if it did not, "political opponents could harass each other by filing frivolous administrative complaints." FEC Mem. at 20. As this Court has recognized, however, it is not the Agency, but the statute itself that determines the proper respondent to a complaint. *See American Fed. of Labor v. FEC*, 177 F. Supp. 2d 48, 52 n.4 (D.D.C. 2001) (defining a respondent as "any person alleged in the complaint to have committed a violation of FECA") (citing 2 U.S.C. § 437g(a)(6)(A)). Moreover, the Agency's concerns are not implicated in this case, because as the FEC concedes, the Candidate's allegations are not frivolous, but rely on a "viable theory." FEC Mem. at 8-9.

Because the FEC cannot cite any legal authority for its asserted "discretion" to identify proper respondents to administrative complaints, the Agency relies heavily on "input" that it solicited from "the regulated community." FEC Mem. at 20-23. Not surprisingly, these parties generally support less enforcement by the Agency. FEC Mem. at 20-23. As a result of such

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investigation. *See supra* Part II.A.3. Plainly, the "problems of proof" that concern the Agency have not hampered that investigation, which has led to multiple felony convictions and guilty pleas. AR01733.

"input," the FEC contends, it no longer treats all parties mentioned in a complaint as respondents if they "merely could be inferred to have violated" the Act. FEC Mem. at 23. But that "new practice" only modified the Agency's prior policy, which was in fact "to notify any party mentioned in a complaint, or attachment to a complaint, where they could be inferred to have violated a provision of the FECA." Agency Procedures, 73 Fed. Reg. 74 ,498 (Dec. 8, 2008). That modification, however, does not provide the FEC with the sweeping discretion it now claims, contrary to express terms of the Act and the mandatory language of its own regulations. Pl. Mem. at 6-8.

CONCLUSION

For the foregoing reasons, and those set forth in the Candidate's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, the Federal Election Commission's Motion for Summary Judgment should be denied, and its dismissal of the Administrative Complaint should be set aside. Further, the Candidate's Motion for Summary Judgment should be granted, and this matter should be remanded for further proceedings consistent with the Act's requirements. Finally, the Candidate should be awarded reasonable costs and attorneys' fees pursuant to 28 U.S.C. § 2412(d)(1)(A).

Dated: March 16, 2011

Respectfully submitted,

/s/ Oliver B. Hall

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2011, I served the foregoing Plaintiff's Opposition To Defendant Federal Election Commission's Motion For Summary Judgment, on behalf of Plaintiff, by means of the Court's CM-ECF system, upon the following parties:

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