IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTILITY WORKERS UNION OF AMERICA, LOCAL 369, AFL-CIO, PLAINTIFF, V. FEDERAL ELECTION COMMISSION, DEFENDANT.	Civil Action No. 09-cv-01022-JDB

SUPPLEMENTAL BRIEF OF PLAINTIFF UTILITY WORKERS UNION OF AMERICA, LOCAL 369, AFL-CIO

1. Pursuant to this Court's January 14, 2010, Minute Order, Plaintiff Utility Workers Union of America, Local 369, AFL-CIO ("Local 369") submits this Supplemental Brief addressing "whether, and/or to what extent, defendant[] [Federal Election Commission's ("FEC")] interpretive guidance on 11 C.F.R. § 114.5(j) affects the resolution of defendant's motion to dismiss."

2. The referenced "interpretive guidance" is the FEC's Explanation and Justification ("E&J") of 11 C.F.R. § 114.5(j), quoted at Paragraph 56 of Plaintiff's Complaint. *See also* Complaint ¶ 48. The E&J is directly relevant to this proceeding and compels denial of Defendant's motion. The E&J was prepared by the FEC in response to a statutory requirement, was presented to Congress for its review by the agency's Chairman as support for the then-proposed regulation, and provides the FEC's controlling interpretation that certain conduct, *i.e.*, "[i]nforming persons of the right [of a segregated fund] to accept [unsolicited] contributions,

is… a solicitation"[1] within the meaning of the Federal Election Campaign Act of 1971 ("FECA"), as amended. While the FEC has relied upon the E&J in rendering "advisory opinions" on solicitation issues during the past 32 years, the Commission wrongly failed to consider the E&J in finding that Local 369 had not shown that Covanta had engaged in an improper solicitation.[2]

3. Applied to the relevant language of the Covanta Handbook (recited in Complaint ¶ 28), the E&J is dispositive support for Plaintiff's positions that the FEC's motion should be denied, and that Covanta engaged in an impermissible solicitation of its employees to contribute to Covanta's federal political action committee ("PAC"). The FEC's dismissal of Plaintiff's Complaint is therefore arbitrary and capricious and "contrary to law" (2 U.S.C. § 437g(a)(8)(C)), and cannot be cured through post-decision arguments of counsel.

A. The FEC was Bound to Follow its E&J in Assessing Plaintiff's Complaint

4. The FEC's Explanation and Justification for 11 C.F.R. § 114.5(j) states, in full: "*Acceptance of Contributions*.—A separate segregated fund may accept *un*solicited contributions from persons otherwise permitted by the Act to make contributions. Informing persons of the right to accept such contributions is, however, a solicitation." H.R. Doc. No. 95-44, at 109 (1977).

5. The FEC is bound by its E&J for Section 114.5(j). Preparation of the E&Js is statutorily-mandated, and is part of the basis on which Congress decides the fate of a

[1] H.R. Doc. No. 95-44, at 109 (1977), *available at* http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf#page=33.

[2] FEC "Factual and Legal Analysis," Matter Under Review 6100, at 3, 4-5 (dated April 2, 2009). The FEC's decision is Attachment B to Plaintiff's Complaint initiating this proceeding. We will follow the FEC's convention, as described in footnote 2 to its Motion to Dismiss, of referring to the attachments to Local 369's civil Complaint as Attachments A and B, and to the attachments to Attachment A as Exhibits 1-11.

Commission-proposed regulation. 2 U.S.C. § 438(d)(2). The E&J in question was included in a 1977 report to the House of Representatives, H.R. Doc. No. 95-44, at 109 (1977), and is of particular significance to the resolution of Plaintiff's Complaint in that the E&J includes the FEC's interpretation of what constitutes a "solicitation" under the FECA, a term not defined in the statute.

6. The FEC has made no secret of the E&Js or their relevance to interpreting Commission regulations. The Commission invites the public to consider them in deciding how to conduct their affairs. The FEC posts the text of its E&Js on its website, states that the E&Js "provide supplemental information concerning Commission rules[,]" and describes them as "Congressional documents and *Federal Register* notices…. The Commission writes an E&J whenever it submits to Congress a new regulation or amends an old one."[3]

7. In reviewing FEC rules, this court has considered E&Js in conjunction with related Commission regulations. *See, e.g.*, *Shays v. FEC*, 508 F. Supp. 2d 10, 65-66 (D.D.C. 2007) ("*Shays III*"), *aff'd in part and rev'd in part on other grounds*, 528 F.3d 914 (D.C. Cir. 2008). The FEC has itself relied on this E&J in numerous cases. *See, e.g.*, Advisory Opinions 1984-55, 1983-38, 1991-03, and 1992-09. Whether or not an E&J rises to the level of a binding Commission "regulation,"[4] it is precedent that the Commission must follow in ruling on an issue to which the E&J is relevant, absent a reasoned explanation for its change of positions. "[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (citations omitted). This Court, in *Shays v. FEC*, 337 F. Supp. 2d 28, 80 & n.50 (D.D.C.

[3] Federal Election Commission, Explanations and Justifications for FEC Regulations, http://www.fec.gov/law/cfr/ej_main.shtml (last visited Jan. 26, 2010).

[4] Agencies are bound by their own regulations. *See United States v. Nixon*, 418 U.S. 683, 694-96 (1974).

2004) ("*Shays I*"), *aff'd*, 414 F.3d 76, 106 (D.C. Cir. 2005), rejected the FEC's attempt to narrowly define the term "solicit" under the Bipartisan Campaign Finance Reform Act ("BCRA") based, in substantial part, on the FEC's unexplained departure from its broader interpretation of that term in the FECA as set forth in Advisory Opinion 2000-07, and thus, from the very E&J at issue here.[5]

B. Covanta's Handbook Informs Non-Solicitable Employees That Covanta's Federal PAC Can Accept Their Contributions

8. As set forth in the E&J, Covanta engages in a "solicitation" if it informs its employees that its PAC has the right to accept contributions from them.[6] The relevant portions of the text of the Covanta's Handbook are set forth in Plaintiff's Complaint and were presented to the FEC below.[7] The Handbook informs employees that the Covanta PAC can accept their contributions. As such, the Handbook text falls directly within the E&J, and establishes that it constitutes a "solicitation."

9. The Handbook informs employees that (a) Covanta has established a federal PAC and (b) contributions to it by "eligible employees" are "voluntary."[8] The Handbook sets no

[5] "'[T]he FEC has consistently held that 'solicitation' occurs when the corporation … informs individuals from whom it may not solicit funds that the PAC may accept *unsolicited* contributions from them….'" *Shays I*, 337 F. Supp.2d at 80 (quoting Plaintiffs' memorandum and citing FEC Advisory Opinion 2000-07).

[6] Consistent with the E&J, in determining what constitutes a "solicitation" the Commission has held that "informing persons of a fundraising activity is considered a solicitation." Advisory Opinion 1976-27, at 2. *See also* Advisory Opinion 1976-96, Advisory Opinion 1978-17, and Advisory Opinion 1979-13. The Commission's construction of the term "solicitation" is based on the legislative history of the Act. *See, e.g.*, Advisory Opinion 1976-96, at 2 ("the legislative history of the Act illustrates that informing persons of a fundraising activity is considered a solicitation."). As Senator Allen indicated during the Senate floor debates on what constituted a solicitation under 2 U.S.C. § 441b(b)(4)(B), the term should be broadly construed: "When they [the corporation or labor organization] announce setting up the fund, obviously, that is a solicitation right there." 122 Cong. Rec. 7895 (1976). As a result of the legislative history, "(p)ast advisory opinions of the Commission have concluded that a contribution solicitation may occur in many types of communications which do not explicitly request the making of a contribution but nevertheless give notice to the communication recipient that a specific PAC exists to accept and make contributions." Advisory Opinion 1978-97, at 1-2 n.2.

[7] The Handbook is Ex. 11 to the FEC Complaint, the entirety of which was included as Attachment A to the Complaint in this proceeding.

[8] There is also no question that Covanta seeks to ensure that employees receive this message. All Covanta

boundaries on the definition of "eligible employees." Instead, and on the same Handbook page, Covanta states (in bold type) that: "**In general, employees are free to make a personal contribution to any political… committees… subject to the individual limitations under state or federal law.**" Complaint ¶ 28. In these circumstances, the only reasonable conclusions that can be drawn from this language are that (1) an undefined set of "eligible employees" can contribute to Covanta's federal PAC, and (2) the PAC can accept such contributions.[9]

10. While the Covanta Handbook does not expressly state that the PAC can accept personal contributions from employees, the suggestion is plain: money is welcome, and contributions will be accepted. Phrased differently, by telling all of its employees that they are free to give to Covanta's federal PAC, Covanta is necessarily and implicitly informing them that the PAC is correspondingly free to accept their contributions: the employees cannot give unless the Covanta PAC can take. Indeed, the FEC has found that language of the very kind used in the Handbook constitutes a "solicitation": "[T]he Commission has… held that where a separate segregated fund informs an individual whom it may not solicit that the individual has the right to make unsolicited contributions to the fund, the act of informing that individual that the fund may accept his contribution is itself a solicitation." Advisory Opinion 1984-55, at 2 n.2, citing, *inter alia*, 11 C.F.R. § 114.5(j) and Explanation and Justification of Part 114.

11. Conversely, the Commission has held that a communication was not a solicitation where boundaries were clearly marked such that the statements were aimed only at those persons from whom funds could lawfully be sought, and discouraged attempts to contribute by

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employees must certify annually that they have read the Handbook, and have a responsibility to comply with the "booklet." Handbook, Ex. 11, at 25.

[9] The FEC states the Handbook language "appears to be merely a statement that the PAC exists, not a solicitation." FEC Decision at 5. As shown, by informing "eligible employees" that contributions to the PAC are "voluntary," the Handbook does far more than "merely" apprise employees of the PAC's existence.

non-solicitable persons by stating "that contributions received from persons outside the restricted class will be returned." Advisory Opinion 2000-07, at 5; Complaint ¶¶ 44-47. That is not the case here. Covanta failed to explain who were "eligible employees" and who were not. Covanta nowhere articulated or implemented meaningful restrictions to discourage contributions from non-solicitable employees, such as those referenced in Advisory Opinion 2000-07 or imposed by the Commission in Advisory Opinion 1991-03, *see* Complaint ¶ 48. The Commission cited Advisory Opinion 2000-07 in support of its decision (at 4), but failed to explain the connection between the facts at issue in that situation and those at issue here.

C. The FEC's Decision Below Was Contrary to Law

12. The Commission concluded below that the Handbook language does not "rise to the level of a solicitation because it does not encourage support for the PAC or facilitate the making of contributions to the PAC." FEC Decision at 4, citing Advisory Opinions. This is akin to the proposed narrow FEC reading of "solicit" under the BCRA that the Court of Appeals rejected as an "absurdity" and subject to evasion by "winks, nods, and circumlocutions." *Shays v. FEC*, 414 F.3d 76, 106 (D.C. Cir. 2005).

13. A straightforward application of the FEC's own precedent, set forth in its E&J and relevant advisory opinions, establishes that the language in Covanta's Handbook is a solicitation. And it is undisputed that the Handbook is directed to all employees, including non-solicitable employees. The FEC neither followed its E&J nor provided a reasoned basis for failing to do so. *ANR Pipeline*, 71 F.3d at 901. Its decision was arbitrary, capricious, and an abuse of discretion and therefore contrary to law within the meaning of 2 U.S.C. § 437g(a)(8)(C). *Democratic Senatorial Campaign Comm. v. FEC*, 918 F. Supp. 1, 5 (D.D.C. 1994). Moreover, having failed to address the E&J in its decision below, the FEC cannot do so now through the arguments of its counsel. Arbitrary and capricious review "demands evidence

of reasoned decisionmaking *at the agency level*; agency rationales developed for the first time during litigation do not serve as adequate substitutes." *Kansas City, Mo. v. HUD*, 923 F.2d 188, 192 (D.C. Cir. 1991).[10]

CONCLUSION

14. WHEREFORE, for the foregoing reasons and those set forth in prior pleadings in this proceeding, Local 369 requests that this Court deny the Defendant's motion to dismiss, set aside the FEC's dismissal of Local 369's Complaint as contrary to law, and direct the FEC to enter a new order consistent with this Court's judgment within thirty days.

Respectfully submitted,

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[10] S*ee Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006) ("Nor can our Court fill in critical gaps in [an agency's] reasoning. We can only look to the [agency's] stated rationale. We cannot sustain its action on some other basis the [agency] did not mention."); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) ("It is axiomatic that we may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review . . . ."); *Shays III*, 508 F. Supp. 2d at 47 (Court cannot rely on post hoc rationalizations of agency counsel).

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2010, I electronically filed the foregoing document through the CM/ECF system, which will send a notice of electronic filing to Erin R. Chlopak, David Brett Kolker, and Kevin Deeley.

Dated on this 26th day of January, 2010.

Respectfully submitted,

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