



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Republican Senate Campaign Committee and) MUR 6126
J. Matthew Yuskewich, in his official capacity)
as treasurer)

STATEMENT OF REASONS

I. INTRODUCTION

The complaint in this matter alleges that the Republican Senate Campaign Committee and J. Matthew Yuskewich, in his official capacity as treasurer, (“RSCC” or “Respondents”) failed to report an “electioneering communication” to the Federal Election Commission (“the Commission”), as required by the Federal Election Campaign Act of 1971, as amended (“the Act”). 2 U.S.C. § 434(f)(2) and 11 C.F.R. § 104.20. The communication, a television advertisement, primarily focused on Gary Kucinich, a candidate for the Ohio State Senate, but also identified by name and photograph Dennis Kucinich, Gary Kucinich’s brother and a Federal candidate in Ohio’s 10th Congressional District. The communication was broadcast on Cleveland television stations in mid-October 2008, less than 60 days before the 2008 general election, and therefore within the electioneering communications reporting timeframe.

In its response to the complaint, the RSCC states that the communication is exempt from the definition of an “electioneering communication” under Section 100.29(c)(5), which exempts advertising paid for by state and local candidates in connection with their state and local elections. The RSCC asserts that because the communication was paid for from an RSCC fund operated for the exclusive benefit of state candidates, and because under Ohio law it amounted to an in-kind contribution to Gary Kucinich’s opponent Thomas Patton, it is exempt as “paid for by a candidate for State or local office in connection with an election to State or local office.” Response at 2. Further, the RSCC also states that the portion of the communication featuring the name and photograph of a Federal candidate was less than one second of a thirty-second advertisement,¹ and that under 11 C.F.R. § 106.1(a), which provides for the allocation of “expenditures” made on behalf of more than one clearly identified Federal candidate,

¹ The Office of General Counsel’s (“OGC”) review of the advertisement indicates that Dennis Kucinich is shown on the screen for 4 seconds, or 13% of the advertisement’s 30-second running time.

only the cost of that portion of the communication may be attributed to the Federal candidate. According to the RSCC, the resulting allocated expenditure is far less than the \$10,000 threshold required to trigger the “electioneering communication” reporting requirement. *Id.* at 3.

On July 14, 2010, the Commission voted to exercise its prosecutorial discretion and dismissed the allegation that the RSCC failed to timely disclose an electioneering communication to the Commission. 2 U.S.C. § 434(f)(2) and 11 C.F.R. § 104.20. Similarly, it dismissed the allegation that the RSCC failed to include an adequate disclaimer within the communication.² 2 U.S.C. § 441d(a)(1) and 11 C.F.R. § 110.11(a)(4) and (b).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The RSCC is a “legislative campaign fund” as defined by Ohio statute. *See* Ohio Rev. Code § 3517.01(B)(15) (a “legislative campaign fund” is established as an auxiliary of a state political party and associated with one of the houses of the [Ohio] General Assembly). The purpose of the fund is to receive contributions and make disbursements furthering the election of candidates who are members of that political party to the house of the General Assembly with which the legislative campaign fund is associated. *Id.* The funds are held separately from the state party’s funds, and are administered and controlled “in a manner designated by the [State] caucus.” Ohio Rev. Code § 3517.10(D)(3)(d). The “caucus” is defined as all of the members of the Ohio House of Representatives or all of the members of the Ohio state senate from the same political party, and for the purpose of administering these funds, includes the chairperson of the state political party, or the chairperson’s designee. *Id.*

In 2008, the RSCC produced a television advertisement entitled “Oh, Brother” critical of Gary Kucinich, a candidate for Ohio’s 24th District State Senate Seat and the brother of U.S. Representative Dennis Kucinich from Ohio’s 10th Congressional District. Available information suggests that the advertisement aired on the Cleveland, Ohio, FOX and NBC affiliates in mid-October 2008. The complaint alleges that the RSCC paid “at least” \$67,275 for airtime to the two television affiliates. The Respondents do not contradict this amount.

The advertisement opens with a photograph of Dennis Kucinich and the voiceover states, “Oh, brother. Dennis Kucinich’s brother is running for State Senate.” After four seconds, the picture of Dennis Kucinich is replaced with a picture of Gary Kucinich, and this photograph remains the background for the remainder of the advertisement. The voiceover continues, discussing Gary Kucinich’s “failed record” while serving as a member of the Cleveland School Board in the early 1990s. The advertisement concludes

² Commissioners Bauerly, Hunter, McGahn, Petersen, and Weintraub voted in favor of the motion. Commissioner Walther did not vote.

with a quotation from an editorial published in the Cleveland *Plain Dealer* in 1992 stating that Gary Kucinich “represents a failed past,” and the voiceover says “Oh, brother is right. We don’t need Gary Kucinich in the State Senate.” The disclaimer states that the advertisement was paid for by the RSCC. The transcript of the advertisement follows:

On Screen	Voiceover
Oh, Brother. . .	Oh, brother.
Photograph of Dennis Kucinich	Dennis Kucinich’s brother, Gary, is running for state senate.
Photo of and text Gary Kucinich Running for State Senate	
Gary Kucinich Failed Record	Maybe Gary Kucinich thought we’d forgotten about his failed record.
Gary Kucinich While a member of the Cleveland School Board: voted to fire 226 teachers Resolution No. 374-91	Like when Kucinich was on the Cleveland School Board and voted to fire 226 teachers . . .
Gary Kucinich While a member of Cleveland School Board: District mishandled funds State Audit for Fiscal Years 1990, 1991, 1992 and 1993	. . . or when the School District was cited for mishandling funds when Gary Kucinich was on the board.
Gary Kucinich The Plain Dealer “Kucinich represent[s] a failed past that the community no longer endorses.” Editorial 4/8/92	The Plain Dealer says Kucinich represents a failed past.
Gary Kucinich We Don’t Need Gary Kucinich in the State Senate Paid for by RSCC/ J. Matthew Yuskewich, Treas. 4679 Winterset Drive/Columbus, OH 43220	Oh, brother is right. We don’t need Gary Kucinich in the State Senate.

B. Legal Analysis

1. Electioneering Communication

An electioneering communication is a “broadcast, cable or satellite communication” that: (1) refers to a clearly identified candidate for Federal office; (2) is made within 60 days before a general election or 30 days before a primary election; and (3) is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29(a). A clearly identified candidate means that the candidate’s name, nickname, photograph or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference. 11 C.F.R. § 100.29(b)(2). A communication is “targeted to the relevant electorate” when it can be received by 50,000 or more persons in the district the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5).

The “Oh, Brother” advertisement identifies by name and photograph Congressman Dennis Kucinich, who was seeking re-election in Ohio’s 10th Congressional District.³ In addition, it appears that the advertisement was broadcast on two Cleveland network affiliates in mid-October, which was within 60 days of the 2008 general election.⁴

Although the “Oh, Brother” advertisement appears on its face to meet the definition of an electioneering communication under 2 U.S.C. § 434(f)(3)(A)(i) and 11 C.F.R. § 100.29, the advertisement does not focus on Dennis Kucinich’s federal candidacy but rather on Gary Kucinich’s race to become a State Senator of Ohio. The advertisement makes no comments about Dennis Kucinich’s race for U.S. Congress and refers to Dennis Kucinich only in passing as Gary Kucinich’s brother.

Under these circumstances, where the advertisement in question focused primarily on Gary Kucinich, a non-federal candidate, and the reference to Dennis Kucinich was merely incidental to the information regarding Gary Kucinich’s non-federal candidacy, the Commission declined to find reason to believe that the RSCC violated 2 U.S.C. § 434(f). Rather, the Commission concluded that it would not be an appropriate use of resources to open an investigation in this matter. Thus, the Commission voted to exercise its prosecutorial discretion, pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and dismissed the allegation.

³ Dennis Kucinich also sought the Democratic Party’s nomination for the office of President of the United States. However, he withdrew from the race on January 24, 2008, before the advertisement at issue was produced or disseminated.

⁴ According to the Federal Communications Commission, a broadcast publicly distributed by Cleveland’s Fox and NBC affiliates is capable of reaching over 50,000 or more persons in Ohio’s 10th Congressional District. *See* 11 C.F.R. § 100.29(b)(6)(i) (information on the number of persons in a Congressional district that can receive a communication publicly distributed by a television station is available on the Federal Communications Commission’s website at www.fcc.gov).

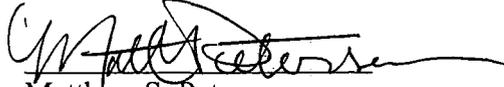
2. Disclaimer

The Act requires that when a person makes a disbursement for the purpose of financing an electioneering communication, the communication shall include a disclaimer that clearly states whether it was paid for or authorized by a candidate or a candidate's authorized political committee. 2 U.S.C. § 441d(a)(1) and 11 C.F.R. § 110.11(a)(4) and (b).

The communication in question contains a clearly readable written disclaimer with a picture of the Committee's treasurer, but does not state that the advertisement was not authorized by any candidate or any candidate's authorized committee as would be required by 11 C.F.R. § 110.11(a)(4) and (b). In addition, the Committee did not include an audio statement that the RSCC was "responsible for the content of this advertising," along with a full-screen view of its representative and a statement that no candidate or authorized candidate's committee paid for or authorized the communication. See 11 C.F.R. § 110.11(b) and (c)(4).

Nevertheless, as discussed above, the advertisement in question focused primarily on Gary Kucinich, a non-federal candidate, and the photograph of Dennis Kucinich was merely incidental to the information regarding Gary Kucinich's non-federal candidacy. Given that the Commission already had decided to dismiss the allegation that the advertisement in question constituted an electioneering communication, the Commission similarly concluded that it would not be an appropriate use of resources to pursue enforcement of the disclaimer allegation in this matter. Therefore, the Commission voted to exercise its prosecutorial discretion, pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), and dismissed the disclaimer allegation.

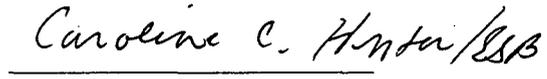
9/8/10
Date


Matthew S. Petersen
Chairman

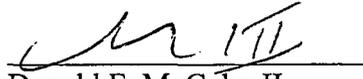
9/8/10
Date


Cynthia L. Bauerly
Vice-Chair

9/8/10
Date


Caroline C. Hunter
Commissioner

9/8/10
Date


Donald F. McGahn II
Commissioner

9/8/10
Date


Ellen L. Weintraub
Commissioner