

educate the public on matters of economic policy formulation,”² focusing on “macro-economic issues.”³ CHGO described itself “as an economic ‘think tank’” on tax, trade, budget, and economic growth policies,⁴ and it apparently furthered these efforts primarily by broadcasting communications across the country.

As noted above, this case began when the Democratic Congressional Campaign Committee (“DCCC”), and thereafter Citizens for Responsibility and Ethics in Washington (“CREW”), filed complaints alleging that CHGO’s communications did not contain the appropriate disclaimers and that CHGO had not properly reported these communications to the Commission in violation of the Act.⁵ CREW separately alleged that CHGO had failed to organize, register, and report as a political committee.⁶

While it existed and participated in the initial stages of this case, CHGO argued that its ads were “specifically issue oriented,” did “not advocate the election or defeat of any identified federal candidate,” and therefore were not reportable independent expenditures.⁷ Additionally, CHGO contended that its communications were not “‘targeted’ at any specific electoral constituency,” a required element of an electioneering communication.⁸ CHGO further asserted that the disclaimers it did include on its communications were not objected to by its broadcasters and sufficiently alerted the public to the identity of the communications’ sponsor.⁹ CHGO maintained that its sole purpose was to educate the public on matters of economic policy formulation, and that it was not a political committee.

After a series of false starts,¹⁰ the Commission received OGC’s (final) First General Counsel’s Report in this matter in December 2013, over three years after the case was initiated.

² Supp. Resp. at 5.

³ Resp. at 2.

⁴ *Id.*

⁵ See Compl., MUR 6391 (Oct. 7, 2010). Specifically, the DCCC alleged that CHGO (i) failed to report its ads pursuant to 11 C.F.R. §§ 109.10 or 104.20, and (ii) failed to include proper disclaimers pursuant to 11 C.F.R. § 110.11. CREW alleged that CHGO spent more than \$2.3 million to broadcast fifteen advertisements and failed to include appropriate disclaimers on those advertisements or report the advertisements to the Commission. See Compl. at 3, MUR 6471 (May 23, 2011), Amend. (Apr. 26, 2012).

⁶ See Compl., Amend., MUR 6471 (Apr. 26, 2012).

⁷ CHGO Resp. at 3, MUR 6391.

⁸ *Id.* To the extent it had made a good faith error in not filing electioneering communication reports, CHGO claimed that the underlying policy considerations of the electioneering communications reporting requirements were served by a combination of the disclaimer contained in each of its communications and the publicly available daily logs of broadcasters required by the FCC. *Id.* at 3-5.

⁹ *Id.* at 4.

¹⁰ On August 31, 2011, OGC circulated its initial First General Counsel’s Report (“FGCR”) to the Commission, with the Commission’s first votes due on September 7, 2011. The Commission quickly calendared and discussed this report at an executive session four years ago, on September 27, 2011. Within two days of that

OGC recommended that the Commission find reason to believe that CHGO had failed to (1) properly report its communications, (2) properly include disclaimers on those communications, and (3) organize, register, and report as a political committee.¹¹ As detailed in the report, the available information was sufficient to support a finding of reason to believe that CHGO had failed to report its communications as required by the Act. The Commission voted unanimously to that effect, authorizing OGC to conduct an investigation into CHGO's apparent reporting failures.¹²

In our view, however, the information available at the time did not support a finding of reason to believe that CHGO had failed to organize, register, and report as a political committee. In particular, it was not at all clear from the incomplete spending breakdown available to the Commission that CHGO had made sufficient expenditures to qualify as a political committee.¹³ It was, however, our expectation that OGC's investigation would provide a more thorough accounting of CHGO's spending, including its spending on each communication, and whether there were other communications not known to the Commission that CHGO had financed. On the basis of that information, we anticipated being able to make a finding regarding CHGO's political committee status.

Ten months after the Commission authorized its investigation, and less than three months before the statute of limitations would expire for the alleged reporting violations, OGC sent the Commission its investigative report. However, the investigation had not developed any more

executive session, however, OGC withdrew its Report to reconsider its analysis. *See* OGC Mem. to Comm. (Sept. 29, 2011)

This reconsideration lasted for over two years, during which time CHGO ceased to exist.

¹¹ First General Counsel's Rpt. at 40, MUR 6391/6471 (Dec. 27, 2013).

¹² Amended Certification, MURs 6391/6471 (Sept. 24, 2014).

¹³ In its First General Counsel's Report, OGC concluded – and our colleagues agreed – that the available (albeit incomplete) information regarding CHGO's spending in 2010 demonstrated that it had likely qualified as a political committee. First General Counsel's Rpt. at 38, MUR 6391/6471 (Dec. 27, 2013). This conclusion rested on the belief that of the \$2.2 million in spending alleged in the complaint, \$1.7 million was for what OGC determined were express advocacy communications, while the rest was spent for communications that in OGC's view supported or opposed clearly identified candidates. *Id.* Equally critical to this conclusion was OGC's belief that the remainder of CHGO's spending from 2010 (reported in IRS filings to have been \$4,770,000, of which \$4,594,825 was devoted to media placement and production alone) was likely similarly apportioned. We have on several occasions set forth our views on the proper analysis for determining political committee status. *See, e.g.*, Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6538 (Americans for Job Security); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6589 (American Action Network). In light of those views, we believe OGC's – and, by extension, our colleagues' – conclusion was flawed in two critical ways. First, we did not agree with the express advocacy analysis included in OGC's report and, therefore, the conclusion that \$1.7M of the spending alleged in the complaint qualified as expenditures. Second, we were not prepared to extrapolate the breakdown of CHGO's total spending (\$4.7 million) based on the \$2.2 million subset of spending alleged in the complaint. We nevertheless signed on to a Factual and Legal Analysis that placed the Respondent on notice that the Commission was considering whether CHGO's activities qualified it as a political committee. Factual and Legal Analysis at 8-9, MURs 6391/6471 (Sept. 30, 2014).

information detailing CHGO's spending on specific communications.¹⁴ In light of this and the impending expiration of the five-year statute of limitations, we proposed that the Commission proceed to pre-probable cause conciliation on the reporting violations, with one of the largest opening civil penalties in recent years.¹⁵

Meanwhile, our colleagues were intent on pursuing a political committee finding despite the imminent expiration of the statute of limitations on the reporting violations. As the statute of limitations dwindled, our colleagues on two occasions delayed action on the matter to afford OGC time to resume its investigation to develop further details on the broader political committee theory.

In the weeks that followed, OGC pursued new investigative leads. For our part, the information learned during this period did not definitively resolve whether there was reason to believe CHGO was a political committee and raised novel legal issues that the Commission had no briefing or time to decide.¹⁶ What did crystallize was that the case had become an academic exercise. The obvious violations became time barred in October. The organization no longer existed, having filed termination papers with the IRS in 2011. It had no money. Its counsel had resigned. There were no people acting on its behalf, and we learned that there did not appear to be any agents of CHGO with whom the Commission could conciliate or who could otherwise legally bind the defunct organization. Indeed, we were informed that any further enforcement action in this matter was a pyrrhic exercise.

At that point, knowing that CHGO no longer existed and that the statute of limitations effectively foreclosed further enforcement efforts in any event, we concluded that any conciliation effort would be futile, and the most prudent course was to close the file consistent with the Commission's exercise of its discretion in similar matters.¹⁷

¹⁴ See Second General Counsel's Rpt. at 10, MUR 6391/6471 (July 28, 2015) (OGC was "not able to definitively itemize CHGO's spending on independent expenditures versus electioneering communications").


¹⁵ Frustrated with the investigative results (or lack thereof), we explained during executive session other investigative steps that might have been helpful in uncovering more detailed information on the amounts spent by CHGO on each communication. Our colleagues apparently interpreted that as a "strong suggestion" or "direction" for OGC to continue its investigation. Not so. Instead, we advocated attempting an immediate conciliation before the five-year statute of limitations was to expire in October. But the matter was held by a Commissioner.

¹⁶ For example, the investigation revealed that a large portion of CHGO's disbursements were for vendor commissions and other general payments to officers or directors or vendors, raising previously unconsidered questions of how to analyze such disbursements for purposes of political-committee-status-analysis. Nor were we persuaded by OGC's calculations that 61% of CHGO's spending was devoted to communications that expressly advocated the election or defeat of a federal candidate. See Third General Counsel's Rpt. at 19, MUR 6391/6471 (Sept. 24, 2015). In any event, the issues had become academic because conciliation was impossible. The purpose of enforcement is to correct or remedy violations of law, not to make policy statements.


¹⁷ See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion . . . [and] often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts . . ."); see also MUR 6638 (Todd Long) (reasons for dismissal included that the committee was terminated); MUR 6236 (MN-06 Congressional Victory Committee) (no further action taken against registered but defunct committee that had no staff); MUR 5358 (Morgan for Congress) (file closed without a


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11/6/15
Date


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Commissioner

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Date


LEE E. GOODMAN
Commissioner

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Date

finding as to a committee because it had terminated); MUR 5218 (Russ Francis) (no further action on knowing and willful personal use violations because individual's exact whereabouts were unknown and he would not likely be able to pay any civil penalty); Statement of Reasons of Commissioners Weintraub, McDonald, Thomas, and Toner, MUR 5089 (Matta Tuchman for Congress, *et al.*) (four years and two months after respondents fraudulently misrepresented themselves as writing on behalf of a party committee, "amongst the most egregious transgressions of our Act," the Commission exercised its prosecutorial discretion to dismiss the matter and close the file due, in part, to "the age of the case" and "the fact Respondents apparently are no longer active in federal politics."). This matter—involving a defunct, terminated, unincorporated, unregistered, and unauthorized organization—is not analogous to those matters in which we exercised our discretion to pursue dormant but registered candidate committees. Those organizations were not terminated and negotiation was possible by working with the former candidate who authorized them and who served as an agent of the committee for certain purposes according to the Act and the Commission's regulations. *See* 52 U.S.C. § 30102(e)(2); 11 C.F.R. §§ 101.2(a), 102.7(d).

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