

BEFORE THE FEDERAL ELECTION COMMISSION

Lovely v. Federal Election Commission

)
)
)

AF #549

**STATEMENT OF REASONS IN ADMINISTRATIVE FINES CASE #549
ON REMAND FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Background

On March 9, 2004, the United States District Court for the District of Massachusetts vacated the Commission’s final determination in Administrative Fines Case #549. *Lovely v. FEC*, 307 F. Supp. 2d 294 (D. Mass. 2004). In this case, the Commission had assessed an \$1,800 civil money penalty against the Committee to Elect Bill Sinnott and its treasurer, William A. Lovely, (collectively “Lovely”) for failing to file a timely electronic disclosure report as required by the Federal Election Campaign Act (“FECA” or the “Act”). The Court held that FECA’s “best efforts” provision, 2 U.S.C. 432(i), requires the Commission to consider whether a committee’s treasurer exercised best efforts to submit timely disclosure reports. The Court also found that the administrative record “does not contain a rationale for the final decision of the Commission,” as required by the Administrative Procedure Act (“APA”). *Lovely*, 307 F. Supp. 2d at 301. The Court explained that it was therefore unclear whether the Commission had determined whether Lovely had made best efforts to comply with the Act’s reporting deadlines. *Id.* The Court remanded Administrative Fines Case #549 to the Commission for further proceedings consistent with its order. *Id.*

Through other proceedings the Commission will pursue its view that 2 U.S.C. 432(i) does not require the Commission to recognize a “best efforts” defense as part of the administrative fines program. For example, the Commission voted to initiate a rulemaking to clarify the applicability of Section 432(i) within the administrative fines program. Nonetheless, the Commission decided to forego appeal and to comply with the Court’s order by considering whether, in this particular administrative fines case, Lovely made “best efforts” to comply with the reporting deadline.

Analysis

Although the Court concluded that the best efforts provision applies to committee efforts to meet reporting deadlines, it did not construe Section 432(i) beyond requiring its application in this

instance.¹ Thus, consistent with the Commission's exclusive statutory authority to formulate policy with respect to the Act, 2 U.S.C. 437c(b)(1), it falls to the Commission to interpret Section 432(i) for this limited purpose.

The Commission is mindful of the statutory terms chosen by Congress; Section 432(i) creates a safe harbor for treasurers who "show[] that best efforts" have been made to report the information required to be reported by the Act. "Best" is an adjective of the superlative degree. "Best efforts" must therefore require more than "some" or "good" efforts. Congress's choice of a "best efforts" standard, rather than a "good faith" standard, suggests that a treasurer cannot rely upon his or her earnestness or state of mind to gain the shelter of Section 432(i)'s safe harbor. Rather, a treasurer has the burden of showing that the actions taken—the *efforts* he or she made to comply with applicable reporting deadlines—meet the statute's demanding benchmark.

The Commission's inquiry in this proceeding upon remand is therefore a narrow one: considering those matters under Lovely's control, has he satisfied his burden of showing that his efforts to submit the committee's 2001 Year End Report in the proper electronic format by the applicable deadline qualify as "best" within the meaning of the statute. The Commission finds that Lovely has not made such a showing, either before or after the January 31, 2002, reporting deadline. Before the deadline, Lovely did not seek the Commission's assistance filing online until hours before the deadline itself, and he then failed to submit his report in the required electronic format, despite receiving adequate help from the Commission's staff to file his report properly. After the deadline, Lovely allowed almost two weeks to pass from the time the Commission informed him that his report had been rejected until he finally submitted it properly.

A. Lovely's Insufficient Efforts *Before* the Deadline

The administrative record reflects that Lovely did not make best efforts to submit his report before the reporting deadline. Two facts from that time frame stand out: (1) Lovely waited until the day of the deadline, January 31, 2002, to seek technical assistance with filing electronically, and (2) Lovely failed to submit his report in the proper electronic format even though that same day the Commission staff specifically informed Lovely of the appropriate steps to file his report in the proper format.

A Year End Reporting Notice and flyer sent to all Congressional committees on December 28, 2001 informed Lovely that all principal campaign committees that made expenditures or received contributions of more than \$50,000 in a calendar year were required to file year-end reports electronically. AR001-06.² The notice also cautioned that all electronic reports had to be submitted in the proper electronic format and pass the Commission's validation program. *Id.*

More than three weeks after this notice was sent, the Commission's Reports Analysis Division ("RAD") reminded Lovely in a January 24, 2002 phone call of the \$50,000 electronic reporting

¹ The Court relied heavily upon the word "submit" in 2 U.S.C. 432(i), which provides that committee reports will be in compliance with the Act if a "treasurer of a political committee shows that best efforts have been used to obtain, maintain, and *submit* the information required by this Act ..." *Lovely*, 307 F. Supp. 2d at 299 (quoting 2 U.S.C. 432(i)) (emphasis added by Court).

² All factual citations are to the Certified Administrative Record, filed with the district court on May 15, 2003.

threshold. AR0063. In the course of this conversation, Lovely asked for an extension and whether he could file his report on paper. *Id.* RAD informed Lovely that neither was possible; the regulations do not allow for extensions, and paper reports cannot be submitted in lieu of electronic filings. *Id.*³ At the close of the conversation, RAD instructed Lovely how to obtain a password for electronic filing. *Id.*

Nonetheless, Lovely did not submit a written request for a password for electronic filing until January 29, 2002 and did not seek technical assistance from the Commission about the problems he was having filing electronically until the very last day, January 31, 2002.

On January 31, 2002, Lovely informed RAD that he was experiencing difficulty filing his report over the Internet and that he had been unable to reach the Commission's Electronic Filing Office ("EFO"). AR0064. If filing over the Internet was not possible, submission of the report on floppy disk via certified mail was a valid option on the deadline date. See 11 C.F.R. § 104.18(h)(2). Thus, during the January 31 phone call, RAD explained to Lovely that if he could save his report to disk he should "file it that way." *Id.* RAD then provided Lovely with the appropriate steps to save his report to disk. The EFO would again provide those same steps to Lovely on February 25, when he successfully followed them to save the report in a manner that passed the Commission's electronic validation program when eventually received on February 27, 2002. AR0051.

In its opinion, the Court found that the Commission had failed to engage in fact-finding on the alleged unavailability of the FEC's help desk on the deadline date or on the cause of the formatting error that led the Commission to reject Lovely's disk. *Lovely*, 307 F. Supp. 2d. at 301. The Commission's EFO was a potential source of technical assistance for over 800 political committees required to file electronically the 2001 Year End Report on January 31, 2002, in addition to other committees seeking assistance with filings that were not yet due. On that day, EFO provided technical assistance to 260 callers. Accordingly, the EFO was, indeed, well-staffed and handling its responsibilities on the day in question. In any event, it appears that the availability of EFO assistance is largely irrelevant because the information provided by RAD on January 31 was adequate.

With respect to the cause of the formatting error, it is undisputed that RAD provided sufficient assistance to Lovely and that some sort of problem on his end prevented him from making the necessary filing on time. In his submissions to the Commission, Lovely himself attributed (AR0051 at ¶10) his failure to file his report in the proper format on the deadline date to problems with his own computer:

[t]he steps [EFO] provided to the Treasurer on February 25, 2002 were the very same steps that [RAD] provided on January 31. However, on January 31, the Treasurer's computer cited errors that prevented the Treasurer from uploading the information to disk according to [RAD's] instructions.

The cause of the formatting problems thus lies with Lovely. This is made even more apparent by the fact that the Commission has validation procedures that must be followed by electronic filers.⁴

³ The Commission's regulations explicitly provide that "[r]eports filed on paper do not satisfy a political committee's or other person's filing obligations." 11 CFR 104.18(a)(2).

⁴ The Commission requires committees filing electronically to ensure that their reports meet the Commission's electronic filing specifications prior to submission: "[e]ach political committee or other person who submits an electronic report shall check the report

Those procedures were the same on January 31 and February 25. That Lovely's February 25 submission passed validation demonstrates that any formatting problems were of his own device.

B. Lovely's Insufficient Efforts *After* the Deadline

The administrative record establishes that Lovely did not make best efforts to properly re-submit his report once the deadline had passed. On February 13, 2002, the EFO received from Lovely a computer disk and paper copy of the Year End Report via certified mail dated January 31, 2002. AR0068. Because the disk was improperly formatted and failed the Commission's validation program, the EFO called Lovely and left him a message informing him that the Commission had rejected his electronic submission. *Id.*; AR0080. On February 14, Lovely contacted Commission personnel and said that he would call back five days later, on February 19, to obtain assistance filing the report in the correct format. AR0068. Lovely did not, however, call the EFO until February 25, 2002—more than three weeks past the filing deadline and twelve days after the Commission had told him that his report had been rejected.

When Lovely finally did call, an EFO staffer walked him through the steps to save his report properly to disk, the very same steps he had received from RAD on the filing deadline. AR0051. Lovely then submitted a properly formatted year-end report that passed the Commission's validation program on February 27, 2002, a full two weeks after the Commission informed Lovely that his original submission had been rejected. AR0048. Lovely has offered no evidence to the Commission explaining why he allowed so many days to pass before taking affirmative steps to submit a properly formatted report.⁵ When he called the Commission's staff on February 14, he did nothing to try to cure his failure to file a timely report but instead merely explained that he would call again later. A treasurer who shows no interest in making the effort to correct his submission promptly after being informed that it did not satisfy the legal requirements cannot reasonably be found to have made "best efforts" to comply with those legal requirements.

In sum, Lovely's belated efforts, before and after the deadline, to submit a properly formatted 2001 Year End Report could hardly be characterized as "best." Lovely waited until hours before the deadline before contacting the Commission to seek assistance with the problems he was having meeting his electronic filing obligations, at which time the Commission provided him with the proper assistance. Nonetheless, Lovely failed to submit his report in the correct electronic format and later waited an additional two weeks before submitting a corrected submission even after Commission personnel informed him that his improperly formatted disk had been rejected.⁶

against the Commission's validation program before it is submitted." 11 C.F.R. 104.18(e)(1) (emphasis added). A filer checks the report against the validation program by selecting "validate" or clicking on an icon in the filing software provided free of charge by the Commission. The software then provides a validation summary that indicates whether the report is free of errors or omissions and, if so, will thereby meet the Commission's electronic filing specifications. When the Commission receives an electronic file, it runs the same validation program.

⁵ According to a contemporaneous record of a conversation between Lovely and RAD on February 26, 2002, Lovely merely indicated that the reason for his delay was that he had been "busy" the previous week. AR0065.

⁶ Although Lovely failed to make best efforts both before and after the deadline, his failure to do so before the deadline has no direct impact on the amount of the civil penalty. To account for postal service delays caused by irradiation of the Commission's incoming mail, the Commission did not penalize Lovely for the period before February 13, 2002. AR0092. As a result, the penalty clock did not begin to run until that date and Lovely was, in effect, fined only for the two weeks that he allowed to pass before getting around to submitting a corrected report that satisfied the legal requirements.

Pursuant to the District Court's March 9, 2004 order, the Commission has reconsidered the record of Administrative Fines Case #549. For the foregoing reasons, the Commission concludes that the Committee to Elect Bill Sinnott and its Treasurer, William A. Lovely, did not make best efforts to comply with the January 31, 2002 year-end reporting deadline. The Commission therefore confirms its earlier imposition of the \$1,800 civil money penalty, the amount called for by the Commission's regulations.

October 4, 2005

Scott E. Thomas
Chairman

Michael E. Toner
Vice Chairman

David M. Mason
Commissioner

Danny L. McDonald
Commissioner

Ellen L. Weintraub
Commissioner