UNIVERSITY ELECTIONS COMMISSION

Case #: UEC-2015-W-005

Released: March 29, 2015

THE MAKE MICHIGAN PARTY, Complainant

v.

THE TEAM PARTY, Respondent

[Cite as: Make Michigan v. The Team II]

Appearances:
Rick Stepanovic, Counsel for the Make Michigan Party
Sarah Brenner, Counsel for the Team Party

Heard Before: BECKER, Election Director (ex officio), KOZIARA, Backup Election Director (ex officio), REESE, and GEORGE, Commissioners.

Commissioners LAWTON and DICKSTEIN did not participate in the consideration of this complaint.

FINAL OPINION & ORDER

Commissioner REESE delivers the opinion of the Commission, which GEORGE, and BECKER (ex officio)1 join as to Part I and which is unanimous as to Part II.

This matter comes before the University Elections Commission (“the Commission”) on the complaint of Complainant, The Make Michigan Party (“Complainant”), against the above captioned Respondent for violations of Article VI of the CSG Compiled Code (“the Election Code”). Complainant alleges that Respondent committed a campaign finance violation by failing to report certain expenses related to the creation of fliers and the purchase of a domain name in violation of §B(7)(e)(ii) of the Election Code, which provides:

ii. Campaign Finance Violations. A campaign finance violation is failing to adhere to the Campaign Finance Regulations set forth in Article VI § D.

CSG Complied Code, art. VI § (B)(7)(e)(ii). The complaint was filed with the Election Director on March 27, 2015. Respondents were advised of the complaint on the same day and given twenty-four hours time to file a

1 As we have previously noted, the Commission has determined that ex officio participants should be able to express their opinions on these matters—given that the Election Code allows them to participate in deliberations—by drafting and joining opinions. But, readers should note that their votes do not count for purposes of determining the judgment of the Commission, nor do their votes affect the precedential value of the decision. Thus, the voting members of the Commission in this case—Commissioners REESE and GEORGE—are unanimous in their view of this matter.
response. Respondent filed a reply brief and counterclaim asserting a frivolous election complaint on March 27, 2015. A hearing on this matter was held on March 27, 2015.

Preliminarily, the parties do not contest, and thus the Commission assumes without deciding, (1) that the Team did create these fliers through the use of MPrint quotas of one or more students affiliated with the team, (2) that the Team did purchase a domain name for a term of one year, (3) that these purchases were made before the official campaign period began, and (4) that they were not reported on the Team’s campaign finance forms (nor were receipts provided).

I

The primary question before the Commission is whether the undisputed conduct of the Team constitutes a violation of the Election Code. We conclude that it does not.

A

The Election Code, in §(B)(7)(a) expressly provides:

a. Campaign Period. The campaign period should commence immediately following the Candidates' Meeting with the Election Director, no later than 16 days before the start of the election. Campaign rules shall apply from the start of the official campaign period until the newly elected representatives are seated. The existence of the official campaign period shall not prohibit candidates from campaigning before the campaign period. The UEC may assess penalties for conduct that occurred before the start of the campaign period, but will not hold a hearing until after the start of the campaign period.

This paragraph contains an inherent contradiction. The first sentence of the paragraph states that the rules articulated in §(B)(7)(a) apply only after the start of the campaign period. The logical import of this directive, since the Assembly has chosen to adopt explicitly our holding in Fernandez v. ForUM Party et al., UEC-2014-W-042 (April 1, 2014) that any violation of §(D) of the Election Code is subject to sanction under §(B)(7) of the Code, is that the campaign finance rules articulated in §(D) do not apply to conduct that occurs before the official campaign period.

The last sentence of §(B)(7)(a), however, states that the Commission may assess penalties for conduct occurring before the start of the campaign period. This makes little sense, as the Commission is only empowered to assess demerits for the violations listed in the Election Code, and §(B)(7)(a) itself states that those rules do not apply outside the campaign period. The reader is left to ponder: if the Commission is only empowered to sanction conduct prohibited by the rules, and the rules don’t apply outside the campaign
period, then what purpose does the language preserving the Commission’s power to sanction conduct occurring outside the campaign period serve?

There are no tools of statutory construction capable of resolving this conflict. The Rule Against Surplusage, which would ordinarily tell us to adopt an interpretation that gives both clauses effect, cannot help us here: no matter which clause we choose to enforce, the other will be robbed of its effect. Nor, unlike the dissent, do we find any guidance in the “purpose” of the Code or its campaign finance provisions. True, the Code expresses a desire to create a campaigning process that is fair and transparent, but it also expresses a desire to limit the amount of time that candidates are subject to time-consuming litigation, fraught with the possibility of disqualification and vote reductions, before this Commission. In other words, the Assembly’s “purpose” (or “purposes” as the case may be)—even to the extent one can even divine a cohesive “purpose” from anything other than the text adopted by a multimember body—is just as contradictory as its chosen text.

And so, at last, we come to the Rule of Lenity, which we have twice before suggested has application to the provisions of the Election Code. *Fernandez*, UEC-2014-W-042 at 5; *Brenner v. George*, UEC-2015-W-002, 5 n. 6 (March 27, 2015). This rule states that where “after all the legitimate tools of interpretation have been applied, ‘a reasonable doubt persists’” as to the meaning of a statute, the interpretation favoring the Defendant (i.e. the Respondent in cases before this Commission) should be adopted. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 299 (2012) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). After hinting at our adoption of this rule for so long, here we explicitly HOLD that the Rule of Lenity applies to cases arising under the Election Code and apply that rule to the case at bar.

As a result, we FURTHER HOLD that the violations listed in §(B)(7) of the Election Code, including the campaign finance violation at issue here, have no application outside the campaign period. We therefore FIND that the Team did not violate the Election Code when it failed to report the expenses challenged by Make Michigan in the case *sub judice*.

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2 Indeed, the usual rule of statutory interpretation is that when two provisions at the same level of generality and adopted simultaneously are irreconcilable, neither should be given effect. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 189 (2012). However, in criminal cases, the use of the Rule of Lenity in this situation is preferable to this solution, because enforcing neither could lead to greater ambiguity or undesirable results. *Id.* at 190. That is the course we pursue here.
Before continuing on to address the Counterclaim asserted by the Team in this matter, we pause for a moment to respond to the dissent’s objections to our holding in Section I.A.

We agree with Backup Election Director Koziara that applying campaign finance regulations to candidate expenditures occurring outside the campaign period might be a better policy. Indeed, one might say the same thing about prohibiting the destruction of opponents campaign materials or the unauthorized use of listservs prior to the beginning of that period. But, as much as the Election Code advances the goals of a fair election and transparency regarding expenditures, it also expresses a preference for a limited period of liability and providing candidates and parties with notice of the rules—via a mandatory meeting—prior to imposing liability. We are not the proper body to choose between these competing goals, and the Assembly (because it has enacted completely irreconcilable language) has not given us any direction.

The approach we adopt today has the benefit of pointing out to the Assembly a problem in the Election Code and allowing them as the democratically elected body chosen to set the policy of the Central Student Government to decide how best to balance these competing considerations. This Commission should not engage in what is truly the work of the Assembly, nor are we empowered to do so. Thus, we join the dissent in urging the Assembly to resolve this conflict. We join the dissent in suggesting that they consider applying some (but perhaps not all) of the Election Code’s rules to campaign-related conduct occurring outside the campaign period. And, we join the dissent it its belief that campaign finance regulations are critical to ensuring a fair and transparent election. But, we cannot join the dissent in its view that it does not exceed our judicial role to establish that policy by judicial fiat.

II

Next, we are called to decide whether or not the complaint filed by Complainant in this matter was frivolous in violation of § (B)(7)(d)(v) of the Election Code. We conclude that it was not.

According to §(B)(7)(d)(v), a Complaint is considered frivolous if it fails to meet the requirements of §(C)(1)(c), which provides:

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3 It seems particularly appropriate to give effect to campaign finance regulations even when expenditures occur outside the campaign period; however, it may not be as wise to expand the opportunity for liability under other rules—such as those pertaining to the use of email.
Complaints shall set forth the names of the respondent(s), clearly identify the campaign rule that was allegedly violated, and allege sufficient facts to show that, if taken to be true, the alleged violation is plausible. Stating legal conclusions without factual support or formulaic recitations of elements of cause of action are not sufficient.

The crux of Respondent’s counterclaim lies in the third of these requirements: plausibility. We have made clear before and reaffirm today that this is an incredibly high standard to meet. The Make Michigan Party v. The For UM Party et al., UEC-2014-W-040, 7–8 (March 28, 2014). As we stated in Make Michigan:

"[A]lthough Complainant does not prevail on the majority of its allegations, this alone does not make its complaint implausible." Id.

As this is only the second time this issue has come before the Commission, we believe that it is necessary to devote some time here to providing guidance as to the meaning of "plausibility" for future parties. In adopting the word "plausible" it is possible the Assembly intended to adopt the standard of pleading used under the Federal Rules of Civil Procedure as articulated by the United States Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). Without a more explicit invitation, however, we decline to wade into the murky and controversy-saturated doctrinal swamp that these two cases have created. Instead, we look for guidance to the former standard set forth by Justice Black in Conley v. Gibson and HOLD that a complaint is not implausible under the Election Code unless, assuming all the facts alleged in the complaint to be true, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." 355 U.S. 1, 45–46 (1957).

Here, the Respondent has not come close to making this showing. The facts, as articulated in the Complainant’s brief would have constituted a violation if (1) they had occurred during the campaign period or (2) we had concluded that the Election Code’s rules applied outside that period. The fact that neither of these events occurred does not render the complaint itself implausible under our standard. The facts provided were sufficient to put the Respondent on notice of the claim, and suggested that, during the campaign period, the Respondent had incurred campaign expenditures that were not accounted for in its campaign finance.

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4 There is no dispute that Complainant properly listed the Respondents and the provisions of the Election Code it believed those Respondents violated.
reporting. These facts would have constituted a violation, but for the facts that Respondent later provided that were not available to the Complainant at the time of filing.

Respondent conceded at hearing that the only evidence of the date these expenses were incurred was the receipts that (obviously) were never submitted for public dissemination as part of Respondent’s campaign finance provisions. Respondent thus would have us rule both that it need not disclose these documents and that, before filing its complaint, Complainant should have known what those documents said. Respondent can’t have it both ways, and while we are willing to allow Respondent to have its cake, the Commission believes that the attempt to eat it too proves too much. We therefore FIND that the complaint filed in the case sub judice was plausible and thus meets the requirements of § (C)(1)(c).

For the reasons stated above, we find the Respondent, THE TEAM PARTY, NOT GUILTY of a violation of § (B)(7)(c)(ii) of the Election Code.

We further find the Complainant, THE MAKE MICHIGAN PARTY, NOT GUILTY of a violation of § (B)(7)(d)(v) of the Election Code.

The Complaint filed against THE TEAM PARTY and the Counterclaim filed against THE MAKE MICHIGAN PARTY are therefore ORDERED dismissed with prejudice.

It is so ordered.