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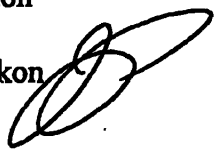
September 12, 2001


MEMORANDUM


AGENDA ITEM


For Meeting of: 9-20-01

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lois G. Lerner 
Acting General Counsel

N. Bradley Litchfield 
Associate General Counsel

Michael G. Marinelli 
Staff Attorney

SUBJECT: Draft AO 2001-12

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 20, 2001.

Attachment

1 ADVISORY OPINION 2001-12

2
3 Linda Honold, Chairperson
4 Democratic Party of Wisconsin
5 222 State Street,
6 Suite 400
7 Madison, WI 53703

DRAFT

8
9 Dear Ms. Honold:

10
11 This refers to your letter dated August 2, 2001, as supplemented with an undated
12 letter received on August 13, on behalf of the Democratic Party of Wisconsin concerning
13 the application of the Federal Election Campaign Act of 1971, as amended ("the Act"),
14 and Commission regulations to the use of an office building fund, maintained by the
15 party, for various purposes related to the renovation or construction of the party's office
16 building.

17 You are the Chairperson of the Democratic Party of Wisconsin ("DPW"). You
18 explain that DPW plans to establish a building fund (or several such funds) that it may
19 use to construct, or to purchase and renovate, an office building to serve as its
20 headquarters. DPW seeks an opinion regarding the Act's preemption of Wisconsin
21 statutes relating to donations for the establishment and operations of the building fund.
22 You indicate that current Wisconsin law limits and in some cases prohibits contributions,
23 disbursements, and obligations to candidates and political parties. *See Wis. State ANN. §*
24 *11.00, et seq. (West 2000).*¹

¹ For example, *Wis. State ANN. § 11.26 (4)* provides that "no individual may make any contribution or contributions ...to any individuals who or committees which are subject to a registration requirement under § 11.05, including legislative campaign committees and committees of a political party, to the extent of more than a total of \$10,000 in any calendar year." Section 11.38(1)(a) states that "No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum. Further, no political party,

1
2 You state that DPW is engaged in both Federal and non-Federal election activity.

3 DPW plans to undertake one or all of the following activities:

4 (1) Establish a building fund to purchase, renovate or construct a building to serve as
5 new headquarters for its Federal and non-Federal activities.

6 (2) Establish a building fund to pay-off the balance of its current lease on the building
7 which presently serves as a headquarters for its Federal and non-Federal activities.²

8 (3) Establish a building fund to pay the salary or fees and other expenses of an employee
9 or consultant whose sole and exclusive responsibility is to raise funds for the building
10 fund.

11 (4) Establish a building fund to pay for the principal and interest for a mortgage for the
12 purchase, renovation and/or construction of the building.

13 (5) Establish a building fund to pay for any capital improvements to the office facility as
14 defined by the Internal Revenue Code.

15 DPW, you state, will use the new or renovated facility to influence Federal and
16 non-Federal elections in a general way, but the described building funds will not be used
17 for the purpose of influencing any particular elections. Furthermore, DPW, in its capacity
18 as a registered entity with the Commission, intends to take the following actions and
19 observe the following conditions:

committee, group, candidate or individual may accept any contribution or disbursement made to or on behalf of such individual or entity which is prohibited by Section 11.38." *Wis. State ANN. § 11.38(b)*.

² According to your request, the DPW originally entered into a five-year lease with the owner of the building property currently being used by the party as a headquarters. This lease expired in 1997. Since then, the party has exercised the one-year option contained in the agreement each year to renew the lease. Currently, the DPW pays rent in the monthly amount of \$1,549. In August 22 and 23 phone conversations with the Office of General Counsel, the Executive Director of DPW indicated that the current one-year lease period will expire on April 14, 2002 and that, because of its inconvenient location, it is unlikely that the DPW will purchase or remain in its current office facility.

- 1 (1) It will solicit and accept corporate contributions designated for the building fund(s).
- 2 (2) It will advise all potential corporate contributors that all corporate contributions will
3 be used for the building fund(s).
- 4 (3) It will establish a "separate segregated" bank account in which only corporate
5 contributions designated for the building fund(s) will be deposited.
- 6 (4) It will disburse the corporate funds deposited in such separate account(s) to purchase,
7 renovate and construct a new headquarters, and pay off the remaining amount owed on its
8 current lease at its existing headquarters.
- 9 (5) It will not use any corporate funds received for the purpose of influencing particular
10 Federal, State, or local elections, or transfer such corporate funds to a bank account used
11 to influence particular Federal, State, or local elections.
- 12 (6) It will not limit, other than on a voluntary basis, the amount of the corporate
13 contributions, individually or collectively, to the building fund(s).
- 14 (7) It will not report the corporate contributions to the building fund(s), other than on a
15 voluntary basis, to the Commission.

16 Finally, DWP plans to apply the funds only for the purchase, renovation or
17 construction of a new headquarters, and to pay-off the remaining amount owed on its
18 current lease at its existing headquarters. It will not use the building fund to pay ongoing
19 costs, such as property taxes and assessments.

20 ***ACT AND COMMISSION REGULATIONS***

21 Under the Act and Commission regulations, a gift, subscription, loan, advance, or
22 deposit of money or anything of value made to a national committee or a State committee
23 of a political party, that is specifically designated to defray the costs incurred for
24

1 construction or purchase of an office facility, is not considered to be a contribution or
2 expenditure, provided that the facility is not acquired for the purpose of influencing the
3 election of any candidate in any particular election for Federal office. 2 U.S.C.
4 §431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix). The
5 Commission has applied these provisions to permit State party committees (and national
6 party committees) to accept corporate and labor union donations to office building funds
7 or accounts established and used for the purpose of purchasing or constructing an office
8 facility by the cited party committees. Advisory Opinions 2000-01, 1997-14, 1993-9,
9 1991-5, 1986-40, and 1983-8; *see also* Advisory Opinions 1998-8, 1998-7 and 1996-8.

10 The Act states that its provisions and the rules prescribed thereunder “supersede
11 and preempt any provision of State law with respect to election to Federal office.” 2
12 U.S.C. §453; 11 CFR 108.7(a). The House committee that approved this provision
13 explained its meaning in sweeping terms, stating that it is intended “to make certain that
14 the Federal law is construed to occupy the field with respect to elections to Federal office
15 and that the Federal law will be the sole authority under which such elections will be
16 regulated.” *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)*. According to the
17 Conference Committee report on the 1974 Amendments to the Act, “Federal law
18 occupies the field with respect to criminal sanctions relating to limitations on campaign
19 expenditures, the sources of campaign funds used in Federal races, the conduct of Federal
20 campaigns, and similar offenses, but does not affect the States' rights” as to other election
21 related conduct such as voter fraud and ballot theft. *H.R. Rep. No. 93-1438, 93d Cong.,
22 2d Sess. 69 (1974)*. The Conference report also states that Federal law occupies the field
23 with respect to reporting and disclosure of political contributions to and expenditures by

1 Federal candidates and political committees, but does not affect State laws as to the
2 manner of qualifying as a candidate, or the dates and places of elections. *Id.* at 100-101.

3 When the Commission promulgated regulations at 11 CFR 108.7 to clarify and
4 explain the scope of the Act's preemption of State law, it stated that the regulations
5 follow section 453 and that, specifically, Federal law supersedes State law with respect to
6 the organization and registration of political committees supporting Federal candidates,
7 disclosure of receipts and expenditures by Federal candidates and political committees,
8 and the limitations on contributions and expenditures regarding Federal candidates and
9 political committees. *Federal Election Commission Regulations, Explanation and*
10 *Justification, House Document No. 95-44, at 51; 11 CFR 108.7(b).* In past opinions, the
11 Commission has summarized the legislative history of 2 U.S.C. §453 as showing that
12 "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that
13 is the sole source of regulation of campaign financing . . . for election to Federal office."
14 Advisory Opinions 2000-23 and 1999-12.

15 ***APPLICATION TO PARTY PROPOSAL***

16 ***Pre-emption of State law***

17 In five opinions that were issued to State parties, the Commission has previously
18 concluded that the Act and Commission regulations preempt and supersede the
19 application of any State law that purports to prohibit corporate donations to a State party
20 office building fund. See Advisory Opinions 1998-8, 1997-14, 1993-9, 1991-5, and
21 1986-40. Two of the opinions noted that, in addressing the building fund donations and
22 the entities receiving them, Congress explicitly decided not to place restrictions on the
23 subject, even though it could have determined that the purchase or construction of such a

1 facility was for the purpose of influencing a Federal election. The opinions explain that
2 Congress, instead, took the affirmative step of exempting (or making exceptions for) the
3 receipt and disbursement of funds for such activity from the specific proscriptions of the
4 Act, and that there is no indication of Congressional intent to limit the preemptive effect
5 to some allocable portion of the purchase (or construction) costs. Advisory Opinions
6 1998-8, 1998-7, 1993-9 and 1991-5; see also Advisory Opinions 1997-14 and 1986-40.

7 DPW's situation is materially indistinguishable from those described in the four
8 cited opinions. *See* 2 U.S.C. §437f(c)(1)(B). Consistent with these opinions, the
9 Commission concludes that the Act and Commission regulations preempt the
10 contribution limitations and prohibitions of Wisconsin State law with respect to donations
11 made to the building fund established by DPW. Accordingly, DPW is not prohibited
12 from accepting corporate donations or other donations in excess of the State limits for the
13 purposes described in this opinion to the extent they are consistent with the lawful uses of
14 the building fund (see discussion below).³

15 ***Uses of building fund(s)***

16 The DWP proposal to establish a building fund(s), with the conditions described
17 herein, for the most part falls within the parameters established by the opinions cited
18 above. For example, the Commission has approved the use of a building fund to pay the
19 mortgage on a new office building. Advisory Opinions 1998-8 and 1993-9. Drawing a
20 parallel to the description and treatment of capital expenditures in the Internal Revenue

³ However, while the Commission has construed the Act and Congressional intent to require disclosure of office building fund activity by the national party committees in reports they file with the Commission (*see* 11 CFR 104.8(f) and 104.9(d)), it has also concluded that any State level disclosure requirements regarding a State party office building fund are not preempted or superseded by the Act or Commission regulations. *See* Advisory Opinions 2001-01, 1997-14 and 1991-5.

1 Code and related IRS regulations, the Commission also has concluded that capital
2 expenditures may be paid from a building fund. See Advisory Opinions 2001-01 and
3 1998-7.⁴ Most recently, the Commission has approved the use of a building fund to pay
4 the salary and certain other expenses that were solely related to the raising of funds for
5 the office building fund. Advisory Opinion 2001-01. Therefore, these expenses, as they
6 apply to your current request, are among the permissible purposes for which the DPW
7 building funds may be used.

8 The situation, however, is different with lease payments for the current DPW
9 office facility. The Commission notes that the building fund exemption specifically
10 applies to costs directly relating to the purchase, construction or renovation of an office
11 building, not the leasing of such facilities.⁵ Therefore, the fund could not have been used
12 for the initial lease of these facilities. Furthermore, unlike the above costs, there is no
13 connection between the payment of the current lease and the construction or purchase and
14 renovation of a new office building. The payment of the lease would not result in the
15 acquisition of any property rights or interest in land that could otherwise be sold and used
16 to finance the purchase.⁶ Accordingly, DWP's office building fund may not be used to
17 pay the described lease expenses.

⁴ In Advisory Opinion 2001-01, the Commission approved the use of funds for management expenses and architectural fees relating to the construction of a party office building. In Advisory Opinion 1998-9, the Commission approved the use of the building fund for the construction of a new roof, new electrical wiring and room expansion for an extant party office building.

⁵ The Commission notes previous opinions stating restrictions as to the use of the building fund. For example, in Advisory Opinion 1983-8, the Commission concluded that the office building fund exception did not apply to donations to pay for the costs of the property taxes, assessments, charges and other expenses incurred by a trust that administered a party's office facilities. In Advisory Opinion 1988-12, the Commission similarly concluded that the office building fund exception did not cover rent, building maintenance, utility, office equipment expenses and other administrative expenses of a party headquarters.

⁶ The Commission notes that your situation can be compared to and distinguished from the situation in Advisory Opinion 1993-9. In that opinion, a State party wished to use the office building fund to pay off the balance of its land contract on the building that served as its headquarters. It proposed to sell the

