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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 3, 2002

MEMORANDUM

AGENDA ITEM

TO: The Commission

For Meeting of: 5-09-02

FROM: Scott E. Thomas
Commissioner *[Signature]*

SUBMITTED LATE

SUBJECT: Alternative draft re AOR 2002-05

Attached is an alternative I would like considered. The first difference from the OGC draft (Agenda Document No. 02-35) is that the requestor is told up front that the exception for travel between Washington and a candidate's district could apply. That means that Ms. Hutchinson only has to treat a portion of the travel as campaign related if she chooses to use Committee funds. If she pays using personal funds or City funds, the Commission, in essence, would look the other way. No reporting of a campaign expense would be required. The exception for travel between Washington and a candidate's district may be an anachronism, but it is part of our law.

The next difference from OGC's draft is that the request is then read to ask what would be the proper reimbursement amount if Committee funds are used. This leads to a discussion of the intersection of the Part 106 rules and the Part 113 rules.

The third difference is that my alternative reads 11 CFR 106.3(a) and (b)(2) and (3) to require the full amount of airfare between the district and Washington to be campaign related. The regulation establishes a hard rule, perhaps, but it is designed to prevent use of outside resources to partially subsidize travel to what has to be characterized as a campaign stop. I can't read Part 113 as overriding this approach. At most, those rules establish that any incremental personal expenses tacked onto a campaign related trip must generate a reimbursement of the campaign to prevent an impermissible personal use. They don't govern whether the rest of the trip expenses must be treated as campaign related. The Part 106 rules do that.

1
2 **ADVISORY OPINION 2002-05**

3
4 **Gregory S. Jager, City Attorney**
5 **City of Bettendorf**
6 **1609 State Street**
7 **Bettendorf, Iowa 52722-4937**

8
9 **Dear Mr. Jager:**

10 **This refers to your letters dated March 4, and March 22, 2002, requesting an**
11 **advisory opinion concerning the application of the Federal Election Campaign Act of**
12 **1971, as amended ("the Act"), and Commission regulations to the spending and reporting**
13 **of funds for Federal election campaign travel by Ann Hutchinson, the Mayor of**
14 **Bettendorf, Iowa.**

15 **You state that you are the City Attorney for the City of Bettendorf, Iowa ("the**
16 **City"). Mayor Hutchinson, is running for the U.S. House of Representatives to represent**
17 **the 2nd Congressional District of Iowa. Her principal campaign committee is, It's Time**
18 **For Ann Hutchinson ("the Committee").¹ You explain that each year, a delegation of**
19 **elected officials, City department heads and various businessmen from Bettendorf and**
20 **Davenport (Iowa), and from Rock Island and Moline (Illinois), travel to Washington,**
21 **D.C., to meet with elected officials and discuss with them issues of concern to the**
22 **described four-city area. This year the delegation consisted of 75 people.**

23 **You explain that Ms. Hutchinson, in her capacity as mayor of Bettendorf, was a**
24 **member of this delegation. Mayor Hutchinson arrived in Washington on March 7 and**
25 **returned to Iowa on March 14. On March 11 and 12, she visited the national headquarters**
26 **of Democratic Party to consult with party officials on her campaign and participate in**

¹ According to Commission records, Ms. Hutchinson's committee filed a Statement of Organization on November 7, 2001, and has filed a 2001 Year-End report.

1 candidate training. You further explain that prior to March 11, she took personal time
2 (sightseeing and the like). On March 13 and 14, she was engaged in City business.

3 You further explain that under City policy, an employee or elected official can
4 take "extra" time at a conference or other business trip for personal purposes, so long as
5 the costs of the extra time are borne solely by the individual, not by the City. Thus, the
6 Mayor's taking extra days for personal matters would otherwise be within City policy.
7 Your concern, however, is how expenses for the travel to Washington would be treated
8 under the Act and Commission regulations, including any reporting obligations for these
9 expenses. You state that, depending on the conclusions reached in this opinion, Ms.
10 Hutchinson will reimburse the cost plus interest as she does not want to use taxpayer
11 funds to further her campaign.

12

13 **ACT AND COMMISSION REGULATIONS**

14 Under the Act and Commission regulations, a candidate and the
15 candidate's committee have wide discretion in making expenditures to influence
16 the candidate's election, and this discretion would include expenses for campaign
17 travel. Commission regulations recognize that candidates and other persons will
18 incur expenses for travel to perform campaign functions. See 11 CFR
19 104.3(b)(4)(i)(A) (listing various purposes, including travel, that should be
20 disclosed as operating expenses of an authorized committee). This wide
21 discretion, though, is restricted by the Act's prohibition on the conversion of
22 campaign funds to the personal use of the candidate or any other person. 2 U.S.C.

1 439(a), 11 CFR 113.1(g) and 113.2(d). Commission regulations provide guidance
2 regarding what would be considered personal use of campaign funds.

3 Personal use is defined as "any use of funds in a campaign account of a
4 present or former candidate to fulfill a commitment, obligation or expense of any
5 person that would exist irrespective of the candidate's campaign or duties as a
6 Federal officeholder." 11 CFR 113.1(g), *see* Advisory Opinions 2000-02 and
7 1996-34. Under 11 CFR 113.2(a)(2), excess campaign funds may be used to pay
8 any ordinary and necessary expenses incurred in connection with one's duties as a
9 holder of Federal office. Commission regulations list a number of purposes that
10 would constitute prohibited personal use. 11 CFR 113.1(g)(1)(i). Where a specific
11 use of campaign funds is not listed as personal use, the Commission makes a
12 determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).

13 Travel expenses of a candidate or her campaign committee, including
14 subsistence expenses incurred during travel, are among those expenses to be
15 analyzed on a case-by-case basis. If travel involves both personal activities and
16 campaign or officeholder related activities, the incremental expenses that result
17 from personal activities are personal use, unless the person benefiting reimburses
18 the campaign within 30 days for the amount of those expenses. 11 CFR
19 113.1(g)(1)(ii)(C).

20 Other Commission regulations also address the treatment of campaign travel
21 expenses. In general, campaign related travel expenses paid for by a candidate's
22 campaign committee or by a candidate from personal funds or from a source other than a

1 political committee, shall be reported as such. 11 CFR 106.3(a), (b)(1). Where a
2 candidate's trip involves both campaign related and non-campaign related stops, the
3 expenditures allocable for campaign purposes are reportable, and are calculated based on
4 the actual cost-per-mile of the means of transportation actually used, starting at the point
5 of origin of the trip, via every campaign related stop and ending at the point of origin. 11
6 CFR 106.3(b)(2). However, where a candidate conducts any campaign related activity at
7 a stop, the stop is campaign related, and the travel expenditures made are reportable.
8 Campaign related activity does not include merely incidental contacts. 11 CFR
9 106.3(b)(3).

10 Of particular importance to your request, is 11 CFR 106.3(d). Costs incurred by a
11 candidate for the United States Senate or the House of Representatives for travel between
12 Washington, D.C., and the State or district in which he or she is a candidate, need not be
13 reported, unless the costs are paid by the candidate's authorized committee or by any
14 other political committee. 11 CFR 106.3(d).²

15

16 APPLICATION TO PROPOSAL

17 *Application of 106.3(d)*

18 Under the terms of section 106.3(d), Ms. Hutchinson would not be obligated to
19 treat the expenses of traveling to and from Washington as campaign related if neither the
20 Committee nor any other political committee paid such costs. Nonetheless, the
21 Commission assumes the candidate wishes to pay for some portion of the overall
22 expenses of the trip using Committee funds, either because the City's rules would so

² Federal candidates, unless they are presidential candidates who have accepted public funding for their campaigns (see 11 CFR 9001 *et seq.* and 9031 *et seq.*), may make unlimited expenditures for their own campaigns using personal funds. See 11 CFR 110.10(a) and 110.10(b).

1 require or because of other considerations. Accordingly, the following analysis indicates
2 how the travel expenses involved would be treated in the absence of the exception at
3 section 106.3(d).
4

1 ***Allocation of travel expenses and 11 CFR 106.3***

2 The Commission notes that the candidate's trip to Washington D.C., included
3 both campaign and non-campaign events. The non-campaign events consisted of both
4 City business and personal activity. Under these circumstances, the regulations at 11
5 CFR 106.3(b)(3) would require that the entire amount of the airfare, plus those
6 subsistence expenses related to campaign activity days, be considered campaign related,
7 unless the campaign related portion is incidental.³ See Advisory Opinions 1992-34 and
8 1994-37.⁴ The facts presented here, involving prearranged campaign meetings and two
9 days devoted to campaign related activity, could not be considered incidental. ⁵

10 ***Personal use regulations***

11 The Commission notes, however, that some incremental costs were for sight-
12 seeing and city business. Under 11 CFR 113.1(g)(1)(ii)(C) and 113.2(d), campaign funds
13 may not be used to pay for the portions of the trip that consisted of days spent exclusively

³ The Explanation and Justification for section 106.3 offers an example for guidance as to what is considered "incidental":

For example, if a candidate makes a non-political speech to a civic association luncheon, and on the way out chats with a few attendees about his upcoming campaign, that conversation would not convert the appearance into a campaign related event. However, if during the course of the speech the candidate asks for support, that would convert an otherwise non-campaign related event into one which is campaign related and would require that travel costs be allocated and reported as expenditures. Explanation and Justification for 11 CFR 106.3 House Doc 95-44, 95th Cong. 1st Sess. (1977) at 50.

⁴ In both these opinions, the Commission explicitly rejected proposals by candidates to allocate proportionally, the travel expenses of a single campaign stop with both Federal campaign related and non-Federal campaign related activity. The Commission noted in Advisory Opinion 1992-34 that the Explanation and Justification for the regulation explicitly states "Where the candidate makes one campaign related appearance in a city, the trip to that city is considered campaign related." *Id.* at 50.

⁵ Under 2 U.S.C. 441b(a), it is unlawful for "any corporation whatever" to make a contribution or expenditure in connection with any election to Federal office. Therefore, as to any part of the trip expenses deemed campaign related, Ms. Hutchinson could not accept City funds. This is because the corporate prohibitions of 2 U.S.C. 441b(a) would apply to the city as a municipal corporation. See Advisory Opinions 1977-22 and 1982-26 (municipal and State-owned corporations were subject to the corporate prohibitions of section 441b); see also Advisory Opinions 1984-48 and 1992-34 (State officeholders who were Federal candidates required to make reimbursement to their respective State governments for assistance and services provided to their Federal campaigns).

1 either on personal activity or City business.⁶ Thus, lodging, meal and other travel
2 expenses for those days would have to be paid in some other manner, perhaps using
3 personal or City funds.

4 In the event Ms. Hutchinson chooses to use campaign funds to pay the City for
5 expenses that would be deemed campaign related, such amounts would be reported as
6 operating expenditures by the Committee. As noted above, if Ms. Hutchinson chooses to
7 use her own personal funds, no reporting obligation would arise under the Act. 11 CFR
8 106.3(d).

9 This response constitutes an advisory opinion concerning the application of the
10 Act, or regulations prescribed by the Commission, to the specific transaction or activity
11 set forth in your request. See 2 U.S.C. 437f.

12 Sincerely,

13
14 David M. Mason
15 Chairman
16

17 Enclosures (AOs 2000-02, 1996-34, 1994-37, 1993-6, 1992-34, 1984-48, 1982-26,
18 1982-64, 1980-49, 1977-22 and 1976-53)
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⁶ Section 113.2(a)(2) permits the use of campaign funds for certain candidate activities if they relate to the candidate's duties as a holder of Federal office. This would not apply to Ms. Hutchinson since she holds local non-Federal office. The Explanation and Justification for 11 CFR 113.2 further provides that campaign funds may be used for Federal, but not State officeholder activities. Explanation and Justification for the Personal Use Regulations 60 FR 7872 (1995). See also Advisory Opinion 1993-6.