



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
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ADVISORY OPINION 2011-27

Sara Berger, Esq.
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20 First Plaza, Suite 700
Albuquerque, NM 87102

Dear Ms. Berger:

We are responding to your advisory opinion request on behalf of New Mexico Voices for Children (“NM Voices”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to NM Voices’ proposed severance payment to its former Executive Director who is currently a candidate for the U.S. House of Representatives.

The Commission concludes that NM Voices’ proposed severance payment to its former Executive Director will not result in a contribution under the Act or Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on December 6, 2011.

NM Voices is a non-profit corporation under section 501(c)(3) of the Internal Revenue Code.¹ Established in 1987 “to create systems-level sustainable change to improve the lives of New Mexico’s children,” it currently has thirteen employees.

¹ Section 501(c)(3) of the Internal Revenue Code exempts from taxation corporations organized and operated exclusively for religious, charitable, or educational purposes (among others) that do not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” 26 U.S.C. 501(c)(3).

Eric Griego served for four years as NM Voices' Executive Director at an annual salary of \$96,400. He did not have a written employment contract. Mr. Griego left NM Voices on October 17, 2011, and is currently a candidate for the U.S. House of Representatives.

The requestor states that Mr. Griego wished to continue his employment with NM Voices while he campaigned, either by taking a leave of absence or by reducing his work schedule. NM Voices' Board of Directors ("the Board"), however, believed that it was in NM Voices' best interest if Mr. Griego resigned. Given its 501(c)(3) status, NM Voices wanted to avoid any appearance that it could influence Mr. Griego's "campaign messaging or platform." Mr. Griego "agreed to resign prematurely to protect" NM Voices' interests. "Consistent with its prior practices," the Board voted to approve a severance payment to Mr. Griego amounting to three months of his salary – contingent upon the Commission's determination that the payment will not result in a contribution from NM Voices to Mr. Griego's campaign.

NM Voices maintains a "written policy manual for its employees regarding their employment," but "the manual does not address severance packages." The Board has discretion to decide whether a departing employee will receive a severance package. Before 2007, NM Voices had occasionally provided severance payments to departing employees, but not as a regular practice. Starting when Mr. Griego joined NM Voices as an Executive Director in 2007, NM Voices instituted an unwritten policy of providing severance to departing employees in certain circumstances.

Under this unwritten policy, NM Voices provided severance packages to employees who were asked to leave the organization involuntarily because the separation was deemed to be in NM Voices' best interest. For example, departing employees received severance payments when their employment was terminated due to a reorganization or other factors deemed to be outside the employee's control. If, however, employees departed voluntarily, or if their employment was terminated for cause, they did not receive severance. Nor did employees receive severance packages when their positions were terminated because of lost grant funding; NM Voices considers such circumstances to be beyond its control. In determining the amount of the severance package, NM Voices historically took into account the departing employee's length of service, past performance, and the expected length of time the employee would need to find comparable employment.

Since 2007, twenty-seven employees have left NM Voices: seventeen resigned voluntarily; two were fired for cause; three were terminated when their positions were eliminated because of lost grant funding; one junior employee left in 2007 but NM Voices' records do not indicate why; and four were asked to leave because their positions were eliminated following a reorganization. Only the four employees terminated as a result of reorganizations received severance packages. Three of these four employees were senior managers, and each of them received severance payments equal to three months of pay. The fourth, a junior staff member, received two weeks of salary.

Question Presented

May NM Voices make a severance payment to its former Executive Director equal to three months of his salary without violating the Act's prohibition on contributions by corporations to candidates?

Legal Analysis and Conclusions

Yes, NM Voices may make a severance payment to its former Executive Director equal to three months of his salary without violating the Act's prohibition on contributions by corporations to candidates, because the severance payment would be made irrespective of his candidacy for Congress.

Corporations, including non-profits, are prohibited from making contributions to Federal candidates or their authorized committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a) and (b)(1). Under 2 U.S.C. 441b, the term "contribution" includes "any gift, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office," and "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization," in connection with any election to any Federal office. 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1).

Under Commission regulations implementing the Act's prohibition on the "personal use" of campaign funds, 2 U.S.C. 439a, a third party's payment of a candidate's expenses that would otherwise be deemed a "personal use" under 2 U.S.C. 439a(b)(2) is considered a contribution by the third party unless the payment would have been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). The Commission's regulations provide that certain types of employment-related compensation are considered to be payments made "irrespective of the candidacy." Payments that are compensation shall be considered contributions unless –

- (A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
- (B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and
- (C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

11 CFR 113.1(g)(6)(iii).

Here, the proposed severance payment will be made “irrespective of the candidacy” and will not constitute a contribution. NM Voices’ proposed severance payment is based on Mr. Griego’s past “*bona fide* employment,” would be made “exclusively in consideration of” his past employment, and would be in line with severance packages provided by NM Voices to “similarly qualified employees for the same work over the same period of time.”

Further, the facts presented here are very similar to the facts considered by the Commission in a prior advisory opinion, Advisory Opinion 2004-08 (American Sugar Cane League), in which the Commission determined that a non-profit corporation’s proposed severance payment to a congressional candidate who resigned to seek Federal office was not a prohibited contribution. The Commission determined that the proposed severance payment would be made irrespective of the candidacy where the former employer had a regular, although unwritten, practice of providing severance packages to its departing employees; the employer used objective factors in determining which departing employees received severance pay; and the severance package was comparable to past severance packages offered by the employer. *See id.*

NM Voices has a regular, although unwritten, practice of providing severance packages to departing employees who were asked to leave because it was in the best interest of the organization.² NM Voices’ severance payment to Mr. Griego would be consistent with the organization’s past practice; he was asked to leave NM Voices because of concerns about the effect of his candidacy on NM Voices’ tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Thus, because the severance payment to Mr. Griego would result from his *bona fide* employment with NM Voices that is genuinely independent of his candidacy and the payment would be made exclusively in consideration of services provided by Mr. Griego as part of his employment, the first two criteria of 11 CFR 113.1(g)(6)(iii) are satisfied. 11 CFR 113.1(g)(6)(iii)(A) and (B).

Moreover, Mr. Griego’s severance package is comparable to prior severance packages provided by NM Voices to its departing employees. Mr. Griego, as a former Executive Director, would receive the same three-month severance package that all other departing senior managers have received from NM Voices for the past several years. The severance provided to Mr. Griego would therefore “not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.” 11 CFR 113.1(g)(6)(iii)(C).

In sum, because the severance payment would be made exclusively in consideration of services provided by Mr. Griego as part of his *bona fide* employment and would be comparable to compensation provided to similarly qualified former employees, the proposed severance meets the requirements of 11 CFR 113.1(g)(6)(iii).

² The Commission concluded in Advisory Opinion 2004-08 (American Sugar Cane League) that “the lack of a written severance policy . . . [is] not fatal to the conclusion that the proposed severance package is compensation ‘irrespective of the candidacy’” given the nature of small organizations. American Sugar Cane League employed five individuals; NM Voices is of comparable size, with only thirteen employees.

Accordingly, the Commission concludes that NM Voices' proposed severance payment to Mr. Griego would not be a contribution under the Act and the Commission regulations.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestors may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinion is available on the Commission's Web site at, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair