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MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*
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Subject: AO 2014-15 (Brat) Revised Draft A

Attached is a proposed revised draft of the subject advisory opinion.

Attachment

3 David Alan Brat
4 Dave Brat for Congress
5 P.O. Box 5094
6 Glen Allen, VA 23058

REVISED DRAFT A

8 Dear Mr. Brat:

9 We are responding to your advisory opinion request concerning the application of the
10 Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the
11 “Act”), and Commission regulations to your proposal for your employer to pay its share of
12 certain fringe benefits and continue your tuition remission benefit during your unpaid leave of
13 absence to run for federal office. The Commission concludes that the proposed payments are not
14 permissible under the Act and Commission regulations but that the continuation of tuition
15 remission is permissible under the Act and Commission regulations.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 September 3, the email received from counsel on September 2, and the comment on the draft
19 advisory opinion received from counsel on October 1, 2014 (“Comment”).

20 You are a candidate for the U.S. House of Representatives in Virginia’s 7th District. You
21 have been employed by Randolph-Macon College (the “College”) since September 1, 1996, and
22 currently you are a full-time, tenured professor. The College is a corporation registered with the
23 Commonwealth of Virginia.

24 When you won the Republican nomination for the U.S. House of Representatives, the
25 College offered and you accepted an unpaid leave of absence for the duration of your campaign,
26 beginning August 8, 2014. You and the College have entered into a Memorandum of
27 Understanding (the “MOU”) setting forth the terms of your leave of absence. One of the terms

1 in the MOU provides for the continuation of fringe benefits for which you were eligible prior to
2 the leave of absence, including medical, life, and disability insurance, and tuition remission. The
3 MOU states that the College will continue to provide its “financial insurance subsidy” for these
4 benefits and requires you to timely pay your portion of the premiums, as well. MOU at 2. Your
5 benefits would be continued for the duration of your unpaid leave, which would end when you
6 return to work at the College or resign to take office, depending on the outcome of the election,
7 “but in no event later than January 1, 2015.” *Id.*

8 Your benefits are being continued under the College’s pre-existing policy regarding the
9 continuation of fringe benefits during an employee’s leave of absence. The College’s Faculty
10 Handbook, which governs your employment, states that “[l]eaves of absence may be granted by
11 the Provost for such reasons and for such duration as the Provost believes are in the best interests
12 of the applicant and of the College. Recommendations on such leaves are made by the
13 Committee on the Faculty.” Email from Katherine Payne, Esq., to Joanna Waldstreicher,
14 Attorney, FEC at 1 (Sep. 2, 2014). According to the request, the College’s provost determines
15 whether to approve a faculty member’s request for a leave of absence, based on the reason for
16 and duration of the leave. Examples of appropriate reasons for approved leave include medical
17 reasons, government or military service, and professional advancement that also benefits the
18 College and its students. If the provost approves the leave request, the provost works with other
19 College staff to make determinations regarding benefits continuation, payment of remaining
20 salary, and details of the faculty member’s return to work, and these terms are memorialized in a
21 letter or MOU. For approved leaves of absence, “the Provost will generally approve the
22 continuation of benefits.” *Id.* at 2. Any College employee who “take[s] unpaid leave or is

1 terminated” is entitled to continuation of the tuition remission benefit for one semester.

2 Comment at 4.

3 ***Question Presented***

4 *Are the terms of the MOU consistent with the Act and Commission regulations?*

5 ***Legal Analysis and Conclusions***

6 The MOU’s provision concerning the College’s payment of the employer portion of your
7 fringe benefits during your unpaid leave of absence would not comply with the Act and
8 Commission regulations, but the continuation of tuition remission during your leave of absence
9 would be permissible.

10 The Act prohibits a corporation from making any contribution in connection with a
11 federal election. 52 U.S.C. § 30118(a), (a)(2) (formerly 2 U.S.C. § 441b(a), (a)(2)); *see also* 11
12 C.F.R. § 114.2(b). Accordingly, Commission regulations specifically provide that a corporation
13 may not pay the employer’s share of the cost of fringe benefits, such as health and life insurance,
14 for an employee who is on leave without pay to participate in the campaign of a federal
15 candidate. 11 C.F.R. § 114.12(c)(1). Commission regulations also provide, however, that a
16 corporation’s payment of compensation to an employee does not result in a contribution from the
17 corporation where the employee engages in campaign activity on *bona fide* vacation time or
18 other earned leave time. 11 C.F.R. § 100.54(c).

19 In determining whether an employer may pay its share of an employee’s benefits while
20 the employee is on leave to conduct campaign work, the Commission has reconciled these two
21 regulations by distinguishing between payments for benefits that the employee accrued before
22 going on leave (which the employer may pay under section 100.54(c)) and benefits that have not
23 accrued but are being continued during the leave (which the employer may not pay under section

1 114.12(c)(1)). *See* Advisory Opinion 2000-01 (Taveras) at 3; Advisory Opinion 1976-70
2 (National Republican Congressional Committee). In applying this distinction, the Commission
3 looks to whether the payments are made pursuant to a generally applicable, pre-existing policy
4 that grants fringe benefits to all employees on unpaid leave as “a form of compensation payable
5 to the employee by [the employer] and as part of ‘other earned leave time.’” Advisory Opinion
6 1992-03 (Reynolds) at 2.

7 In Advisory Opinion 2000-01 (Taveras), the Commission noted that the distinction
8 between earned payments and continued payments in this context turns largely on whether the
9 employer has discretion regarding whether to make the payments. Thus, “earned vacation time
10 or leave time [has been] accrued by an employee [w]here the only discretionary question is when
11 the earned leave may be used.” *Id.* at 3. Compensation payments have not accrued, however,
12 where their payment turns on “a discretionary determination by the [employer] which is based, in
13 part, on factors other than past employment.” *See id.*; *see also* Advisory Opinion 1992-03
14 (Reynolds) at 2 & n.2 (concluding that benefits payments were permissible where employer’s
15 policy provided for 31 days of benefits for all employees on leave).

16 Here, the College’s policy regarding unpaid leave and the continued payment of
17 insurance benefits is discretionary. The Faculty Handbook provides that the provost may
18 approve or deny requests for unpaid leaves of absence “in the best interests of the applicant and
19 of the College,” but neither this portion of the Handbook nor the provisions governing benefits
20 requires (or even addresses) the continuation of benefits during leave. Rather, the request states
21 that the “[t]ypical[]” procedure for requests is that, if leave is granted, “the Provost, working
22 with [other staff], will make determinations regarding benefits continuation.” Such continuation
23 is then “generally” approved. The fact that “determinations” must be made and that benefits

1 continuation is “generally” approved indicates that such continuations during leave are not
2 earned payments that the employer owes the requestor a matter of binding policy, as in Advisory
3 Opinion 1992-03 (Reynolds), but are instead discretionary accommodations that the College
4 offers the requestor voluntarily, as in Advisory Opinion 2000-01 (Taveras) and Advisory
5 Opinion 1976-70 (National Republican Congressional Committee). Thus, under the
6 Commission’s consistent approach to such situations, the proposal here to continue the College’s
7 payments for your fringe insurance benefits during your leave of absence is prohibited by section
8 114.12(c)(1).¹

9 In addition to section 114.12, section 113.1(g)(6) of the Commission’s regulations also
10 prohibits the payments at issue here. Under section 113.1(g)(6), any compensation paid to a
11 candidate is a contribution to that candidate unless:

- 12 (A) The compensation results from *bona fide* employment that is
13 genuinely independent of the candidacy;
14
15 (B) The compensation is exclusively in consideration of services
16 provided by the employee as part of this employment; and
17
18 (C) The compensation does not exceed the amount of
19 compensation which would be paid to any other similarly qualified
20 person for the same work over the same period of time.

21
22 11 C.F.R. § 113.1(g)(6)(iii).

23
24 The facts of your request would not satisfy these criteria. Because you would not be
25 performing any work for the College during the period of your unpaid leave, the compensation
26 would not be “exclusively in consideration of services provided by [you] as part of [your]

¹ The Commission notes that section 114.12(c)(1) also provides that “an employee . . . may, out of unreimbursed personal funds, assure the continuity of his or her fringe benefits during absence from work for political campaigning, and such payment would not be a contribution in-kind.” 11 C.F.R. § 114.12(c)(1). Therefore, although the College may not pay for your fringe benefits during your leave of absence, you may continue to receive these benefits during your leave of absence if you pay the cost yourself from unreimbursed personal funds.

1 employment.” *See* Advisory Opinion 2000-01 (Taveras) at 4. In addition, the insurance
2 payments that the College has offered through the MOU are not “genuinely independent of
3 [your] candidacy”: The MOU makes clear that its terms are being offered “[b]ecause of the time
4 commitment required to engage in such a high-profile campaign” and “[in] the best interests of
5 both [the requestor] and the College.” In other words, the MOU acknowledges that its terms are
6 influenced by the reason for your leave of absence — that is, your federal candidacy — and
7 therefore that an employee on leave for a different reason might receive different terms. Thus,
8 because the payment for your insurance benefits would be made not in consideration of any
9 services you offer the College, but rather (at least in part) because you are running for elected
10 office, the College’s payment of benefits during your leave of absence would constitute a
11 prohibited contribution under 11 C.F.R. § 113.1(g)(6).

12 Although the College’s continued payment of your insurance benefits is not permissible
13 for the reasons discussed above, the Commission concludes that continuation of your tuition
14 remission benefit is permissible. Because any College employee is entitled to continued tuition
15 remission for one semester — even if the employee has been terminated — this benefit is not
16 subject to the same discretionary determination as the other benefits discussed above. An
17 employee’s eligibility for continued tuition remission, unlike eligibility for a continuation of
18 insurance while on unpaid leave, is based exclusively on the employee’s past employment status;
19 tuition remission is available for one additional semester beyond employment by virtue of that
20 employment itself. Therefore, as in Advisory Opinion 1992-03 (Reynolds), here the tuition
21 remission benefit is a vested benefit similar to accrued vacation or other leave time, and it is
22 therefore permissible under sections 100.54(c) and 113.1(g)(6).

23 This response constitutes an advisory opinion concerning the application of FECA and

1 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
2 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a
3 change in any of the facts or assumptions presented, and such facts or assumptions are material
4 to a conclusion presented in this advisory opinion, then the requestor may not rely on that
5 conclusion as support for its proposed activity. Any person involved in any specific transaction
6 or activity which is indistinguishable in all its material aspects from the transaction or activity
7 with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See*
8 52 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f(c)(1)(B)). Please note that the analysis or
9 conclusions in this advisory opinion may be affected by subsequent developments in the law
10 including, but not limited to, statutes, regulations, advisory opinions, and case law. Any
11 advisory opinions cited herein are available on the Commission's website.

12 On behalf of the Commission,

13
14
15 Lee E. Goodman
16 Chairman
17