

Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

October 5, 2021

Federal Election Commission
Office of Complaints Examination
& Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, DC 20463

Re: Matter Under Review 7917

Dear Mr. Lockett,

This response is submitted by undersigned counsel on behalf of Derrick Van Orden, Van Orden for Congress (the “Committee”) and Mary Clancy, in her capacity as Treasurer (collectively, the “Respondents”), in connection with Matter Under Review 7917.

The Complaint makes unsupported and misguided allegations regarding the use of campaign funds for travel by Mr. Van Orden in early 2021; specifically, that such travel constituted the impermissible personal use of campaign funds. As the facts presented herein will demonstrate, however, the travel at issue was political in nature and, as such, an appropriate use of campaign funds. Accordingly, for the reasons set forth below, the Commission should find no reason to believe that the Respondents violated the Federal Election Campaign Act of 1971, as amended (the “Act”), or any Commission regulation (“Regulations”). The Complaint warrants no further consideration and should be promptly dismissed.

I. Factual Background

Derrick Van Orden is a current candidate for the U.S. House of Representatives seat in Wisconsin’s Third Congressional District, and was a candidate for the same in the 2020 election cycle. Mr. Van Orden designated Van Orden for Congress (the “Campaign”) as his authorized campaign committee for both the 2020 and 2022 federal election cycles. The Campaign filed its initial Statement of Organization for the 2020 cycle on March 13, 2020, and its amendment for the 2022 cycle on April 8, 2021. Mr. Van Orden’s Campaign was registered with the Commission from March 13, 2020 through the date of this letter; at no time during this period did the Campaign terminate its registration.

On January 3, 2021, Mr. Van Orden traveled to Washington, DC for a series of political meetings. The first round of meetings, taking place on January 5th, were political meetings with Members of the U.S. House Republican caucus. Meetings with Republican party staff were scheduled for January 7th, but were ultimately canceled due to the events that unfolded on January 6th. Although briefly present near the January 6th “Save America” rally (“the Rally”)

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during his trip, Mr. Van Orden did not actually attend the Rally. Rather, Mr. Van Orden arrived late and, due to his desire to avoid the large crowds, remained on the periphery of the event. Mr. Van Orden departed once the crowd dispersed from the Rally and the unlawful activity began to unfold. He returned home to Wisconsin on January 7, 2021. Mr. Van Orden's travel was paid for with campaign funds.

II. Legal Analysis

The Act expressly enumerates several permissible uses of campaign funds by an authorized committee: 1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office; 2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; 3) contributions to organizations described in 26 U.S.C. 170(c); 4) transfers, without limitation, to national, state or local political party committees; and 5) donations to state and local candidates subject to the provisions of state law. *See* 2 U.S.C. 439a(a); *see also* 11 CFR 113.2(a)-(c). In addition to the foregoing categories, campaign funds may be used for any other lawful purpose not otherwise prohibited by 2 U.S.C. 439a(b), provided that such use does not constitute the "personal use" of campaign funds. 2 U.S.C. 439a(b)(1); 11 CFR 113.2.

The "personal use" of campaign funds is defined as any use of campaign funds to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign. 11 CFR 113.1(g); *see also* 2 U.S.C. 439a(b)(2). The Act and Regulations provide a non-exhaustive list of expense categories that are considered *per se* personal use, including household items or supplies, clothing, tuition payments, entertainment, and mortgage, rent or utility payments. *See* 2 U.S.C. 439a(b)(2); 11 CFR 113.1(g)(1)(i). For items not included on that list, including travel expenses, the Commission conducts a case-by-case analysis to determine whether any personal use has occurred. 11 CFR 113.1(g)(1)(ii).

An authorized committee may remain open and operational for as long as the candidate may choose, regardless of the status of his or her candidacy. The Regulations provide that a committee *may*, but is not required to, wind down the campaign once it no longer intends to receive contributions or make expenditures that would otherwise qualify it as a political committee, and has no outstanding debts or obligations. 11 CFR 102.3; 11 CFR 116.1. If, however, the candidate intends to continue to engage in such activities, he or she may keep the campaign open or convert it to a non-connected political committee. Any use of committee funds remains subject to applicable law. Regardless of the course of action undertaken, there is no requirement that a candidate wind down his or her campaign immediately after an election, and limit the committee's activities as a result. *See* 11 CFR 113.1, 11 CFR 113.2.

The Complainant in this instance mistakenly alleges that Mr. Van Orden's political travel to Washington, DC constituted the personal use of campaign funds. However, the clear purpose of this travel was for Mr. Van Orden to attend several scheduled meetings with Members and Party staff about his political future, and the ongoing nature of his Campaign at the time of the meetings is just one more fact to justify the necessity and purpose of the trip. That being true, we must view this complaint for exactly what it is: an attempt to highlight Mr. Van Orden's

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presence, however limited and incidental, at the Rally, in hopes that this narrative would negatively impact Mr. Van Orden's political future and bolster the chances of success for those candidates and committees that the Complainant wishes to support. Such politically motivated allegations and desires cannot serve as the basis for a complaint, which rests solely on an incomplete and conveniently misguided interpretation of the law.

The campaign funds at issue were used for political travel. In this instance, such travel, although not in connection with any particular election, was permitted as "any other lawful purpose." Further, because travel for these meetings would not exist irrespective of Mr. Van Orden's campaign for federal office, it did not constitute the personal use of campaign funds. As such, the use of campaign funds in this manner was expressly permitted by federal law. Despite what the Complainant would have you believe, Mr. Van Orden's presence near the Rally does nothing to change this analysis.

To be clear, even if the sole purpose of Mr. Van Orden's travel was to attend the Rally, which it was not, such travel expenses would be a permissible use of campaign funds under the Act and Regulations. The costs attendant to a candidate's presence at a political event constitute, at the very least, "any other lawful purpose" for which campaign funds may permissibly be used. These expenses do not, as the Complainant contends, constitute personal use, as the expenses do not fall within an expressly enumerated personal use category, nor would they exist irrespective of Mr. Van Orden's candidacy. The nature of the Rally was inherently political¹, akin to any other Party event or committee fundraiser for which campaign funds may freely be used. Indeed, the Commission has long affirmed that the networking, fundraising and goodwill-building opportunities inherent in political and policy-related gatherings and events render the costs associated with attendance a permissible use of campaign funds. *See, e.g.*, Advisory Opinions 1996-20 (Lucas) and 1995-47 (Underwood). Accordingly, Mr. Van Orden was permitted by federal law to use campaign funds for this travel. The fact that the primary purpose of the travel was to attend bona fide political meetings in the days before and after the Rally only bolsters the permissibility of the use of campaign funds in this manner.

Nor does Mr. Van Orden's status as a candidate change the analysis. Complainant attempts to allege that, because Mr. Van Orden had not yet filed his Statement of Candidacy for the 2022 election cycle, that his campaign was limited in the use of its funds. As explained above, this simply is not the case. The Campaign was registered with the Commission, properly functioning, and filing timely reports. A candidate is under no obligation to "wind down" the campaign in the weeks immediately following an election. Rather, it may continue to raise and spend funds in accordance with federal law, just as the Campaign did in this instance. Further, contrary to what the Complainant contends, Mr. Van Orden was under no obligation to file a 2022 Statement of Candidacy as of the dates in question, as none of his activity had yet resulted in his qualification as a 2022 federal candidate.

¹ For the avoidance of confusion, this response's references to the Rally are just that: references to the Save America rally on January 6, 2021, and not to the unlawful events that transpired as the Rally dispersed. Mr. Van Orden did not take part in those unlawful events, and thus, despite Complainant's attempts to allege otherwise, campaign funds were not used in connection with the post-Rally events.

III. Conclusion

Mr. Van Orden's travel to and from Washington, DC for political meetings and presence near the Rally was a permissible use of campaign funds under the Act and Regulations. The Complaint is based on a carelessly incomplete account of both the facts and law, amounting to nothing more than a transparent political attack cloaked in legal garb. The allegations are riddled with speculation and are unsupported by any concrete or verifiable facts, providing no basis for the Commission to find reason to believe that any violation of federal law occurred. Because the Complaint is wholly devoid of merit and fails to withstand any degree of scrutiny, we urge the Commission to promptly dismiss the matter without further action.

Sincerely,

A handwritten signature in cursive script that reads "Christine Fort".

Christine Fort
Counsel to Van Orden for Congress