



FEDERAL ELECTION COMMISSION
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May 2, 2002

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 2002-05

AGENDA ITEM
For Meeting of: 5-9-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 9, 2002.

Attachment

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

DRAFT

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

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 of the Democratic Party to consult with party officials on her campaign and participate in
2 candidate training. You further explain that prior to March 11, she took personal time
3 (sightseeing and the like). On March 13 and 14, she was engaged in City business.

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

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 is, however, 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.

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

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

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

Other Commission regulations address the reporting treatment of campaign travel expenses. In general, campaign travel expenses paid for by a candidate from personal

funds, or from a source other than a political committee, shall be reported.² 11 CFR 106.3(b)(1). Where a candidate's trip involves both campaign related and non-campaign related stops, the expenditures allocable for campaign purposes are reportable, and are calculated on the actual cost-per-mile of the means of transportation actually used, starting at the point of origin of the trip, via every campaign related stop and ending at the point of origin. 11 CFR 106.3(b)(2). However, where a candidate conducts any campaign related activity at a stop, the stop is campaign related, and the travel expenditures made are reportable. Campaign related activity does not include any incidental contacts. 11 CFR 106.3(b)(3). In addition, costs incurred by a candidate for the United States Senate or the U.S. House of Representatives for travel between Washington, D.C., and the State or district in which she is a candidate, need not be reported, unless the costs are paid by the candidate's authorized committee or by any other political committee. 11 CFR 106.3(d).

APPLICATION TO PROPOSAL

Allocation of travel expenses and 11 CFR 106.3

The Commission notes that the candidate's trip to Washington D.C., included both campaign and non-campaign events. The non-campaign events consisted of both City business and personal activity. Under these circumstances, the regulations at 11 CFR 106.3(b)(3) seem to require that, rather than just a portion, the entire amount of the travel expenses for the trip would be considered campaign related, unless the campaign

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). The question of whether a Congressional candidate's use of personal funds for campaign travel is reportable depends upon the application of 11 CFR 106.3(d). See discussion below.

related portion is incidental.³ See Advisory Opinions 1992-34 and 1994-37.⁴ In the facts presented here, the amount of time spent on campaign related activity, two days out of an eight-day trip, could not be considered incidental.

Personal use regulations

The Commission notes, however, that a conclusion that the Washington travel was entirely campaign related would imply that campaign funds could be used to pay for all the expenses of the trip, including the sight-seeing, City business, and campaign related portions. This result would be inconsistent with or even contrary to the Commission's personal use regulations at 11 CFR 113.1.

Section 106.3(b)(3) and the advisory opinions applying the regulation predate the current personal use regulations.⁵ It is significant that section 106.3, promulgated in 1977, reflects a policy which was also less restrictive regarding the personal use of

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 See footnote 4.

1 campaign funds.⁶ This personal use approach was substantially altered in 1995 when the
2 Commission adopted the current personal use regulations at Part 113. Therefore, when
3 applying 11 CFR 106.3(b)(3), the Commission's more recent policy concerns and
4 interpretations regarding the personal use prohibition must be given greater significance.

5 As noted above, rather than treating the entire trip as campaign related pursuant to
6 106.3(b)(3), the approach in section 113.1(g) would be incremental.⁷ Campaign funds
7 may be used to pay those expenses of the trip that relate to days when Mayor Hutchinson
8 met with party officials to discuss her candidacy or engaged in political activities to assist
9 her preparation as a candidate.⁸ Campaign funds may not be used to pay for the portions
10 of the trip that consisted of days spent either on personal activity or City business.⁹ For
11

⁶ Until the repeal in 1989 of a "grandfather clause" to the personal use prohibition of 2 U.S.C. 439a, many Members of Congress were permitted to convert campaign funds to personal use without any limitation. See Explanation & Justification for Personal Use Regulations, 60 FR 7862 (1995). Even without the grandfather clause several advisory opinions, superseded by the personal use regulations, had given candidates significant leeway in using campaign funds for living and subsistence expenses. See Advisory Opinions 1976-53, 1980-49, and 1982-64.

⁷ An incremental approach toward travel expenses of trips with multiple purposes departs from the interpretation of 11 CFR 106.3(b)(3) in Advisory Opinions 1992-34 and 1994-37. Therefore, the portions of these two opinions dealing with section 106.3(b)(3) that are inconsistent with the analysis adopted in this opinion are hereby superseded.

⁸ Indeed campaign funds, and not City funds, would have to be used for campaign travel. Under 2 U.S.C. 441b(a), it is unlawful for "any corporation whatever" to make a contribution or expenditure of money or anything of value in connection with or to influence any election to Federal office. Therefore, if it were concluded that, pursuant to section 106.3(b)(3), the entire trip was campaign related, then Ms Hutchinson could not accept City funds even for those portions of her travel that related exclusively to her official activities on behalf of the City. This is because the corporate prohibitions of 2 U.S.C. 441b(a) would apply to the City as a municipal corporation. For example, in Advisory Opinions 1977-22 and 1982-26, the Commission determined that municipal and State-owned corporations were subject to the corporate prohibitions of section 441b. In Advisory Opinions 1984-48 and 1992-34, the Commission reviewed the proposals by State officeholders, who were Federal candidates, to make required reimbursement to their respective State governments for assistance and services provided to their Federal campaigns.

⁹ 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.

1 expenses that related to portions of the trip that were not campaign related, but related to
2 her activities on behalf of the City, the Act and Commission regulations do not require
3 that she reimburse the City.

4 While the above discussion would apply to the incremental travel, subsistence and
5 lodging expenses of Ms. Hutchinson, a slightly different approach would apply to the cost
6 of the actual airfare to Washington. Because the airfare represents a defined expense that
7 would have existed irrespective of any personal or campaign related activities, the entire
8 cost of the ticket may be paid for by City with no obligation by Ms. Hutchinson or her
9 campaign committee to reimburse the City. See Advisory Opinion 1993-6.¹⁰

10 *Use of candidate's personal funds and reporting issues*

11 The Commission notes Ms. Hutchinson's proposal to reimburse the cost of the
12 travel expenses. As noted above, candidates campaigning for election to the House of
13 Representatives may make unlimited expenditures of personal funds to finance their own
14 campaigns.¹¹ These expenditures, though unlimited, are contributions to their campaigns
15 and must in most circumstances be reported. Specifically, any campaign travel expenses
16 paid for by Ms. Hutchinson using personal funds must be reported. 11 CFR 106.3(b)(1).

¹⁰ The Explanation and Justification for the personal use regulations note that when using the incremental approach to deal with the costs of a trip to one location which includes a campaign speech and a vacation, the candidate "is not required to reimburse [his] committee for any portion of the airfare, since that expense would have been incurred even if the trip had not been extended. See Advisory Opinion 1993-6." *Id.* at 7869.

¹¹ You have not detailed any specific method Ms. Hutchinson would use to reimburse the City for cost of the travel expenses. While she may use her personal funds for this purpose, she could not first donate personal funds to the Committee that, in turn, would repay the City for all the expenses of the trip. This is because part of the travel expenses relate to personal and City business purposes which, as noted above, cannot be paid for with campaign funds. The Committee may only pay for the portions of the trip that are campaign related.

1 The Commission notes, however, that the travel involved was from the Congressional
2 District, which Ms. Hutchinson is seeking to represent, to Washington, D.C. These travel
3 expenses can receive a different reporting treatment. Under 11 CFR 106.3(d), if Ms.
4 Hutchinson used her own personal funds to pay for these expenses, then they would not
5 be reportable as expenditures.¹² However, if the Committee pays any portion of the
6 expenses that it would be permitted or required to pay for, the Committee must report
7 those expenditures. *Id.*

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

11 Sincerely,

12
13 David M. Mason
14 Chairman
15

16 Enclosures (AOs 2000-02, 1996-34, 1994-37, 1993-6, 1992-34, 1984-48, 1982-26,
17 1982-64, 1980-49, 1977-22 and 1976-53)
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20

¹² Special reporting rules become applicable if the campaign later reimburses her for the travel expenses.
See 11 CFR 116.5(b).

