

AGENDA DOCUMENT NO. 11-04-C



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Lawrence L. Calvert, Jr.
Associate General Counsel 

DATE: February 17, 2011

RE: Kucinich for President, Inc. LRA #640

For Meeting of 2-17-11

SUBMITTED LATE

Attached is a proposed revised draft of a Statement of Reasons in the above-referenced matter.

Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Dennis J. Kucinich) LRA # 640
Kucinich for President, Inc.)

**STATEMENT OF REASONS IN SUPPORT OF REPAYMENT DETERMINATION
AFTER ADMINISTRATIVE REVIEW**

**I. SUMMARY OF REPAYMENT DETERMINATION AFTER ADMINISTRATIVE
REVIEW**

Pursuant to 26 U.S.C. § 9038(b)(2), the Federal Election Commission (“Commission”) affirmed after administrative review, on _____, 2011, that Dennis J. Kucinich and Kucinich for President, Inc. (collectively, “KFP”) must repay \$52,443 to the United States Treasury. Therefore, the Commission orders KFP to repay \$52,443 to the United States Treasury within thirty (30) calendar days after service of this repayment determination upon administrative review. 11 C.F.R. § 9038.2(c)(3) and (d)(2). This document is the Statement of Reasons that sets forth the legal and factual basis for the Commission’s repayment determination after administrative review. 11 C.F.R. §§ 9038.2(c)(3).

II. PROCEDURAL BACKGROUND AND KFP ARGUMENTS

Congressman Dennis J. Kucinich (“Kucinich”) sought the Democratic Party’s nomination for the office of President of the United States in the 2004 primary election. Kucinich for President, Inc., his principal campaign committee, registered with the Commission on February 21, 2003. Congressman Kucinich applied for matching funds, and the Commission determined him eligible to receive matching funds on December 23, 2003. KFP received a total of \$3,291,963 in matching funds from the United States Treasury. The Commission determined that Kucinich’s date of ineligibility (“DOI”) was March 4, 2004, after he failed to receive ten percent of the vote in two consecutive primary elections, and notified him by letter dated

March 15, 2004. *See* 11 C.F.R. § 9033.5(b). Kucinich continued his campaign after his DOI through the date of the Democratic Party nomination on July 29, 2004, although he could not use matching funds to campaign after his DOI. *See* 11 C.F.R. § 9034.4(a)(3)(ii).

On March 8, 2007, the Commission approved the Audit Report and determined that KFP must make a *pro rata* repayment of \$135,518 to the United States Treasury.¹ The Commission's audit found that KFP used \$454,015 in funds containing a portion of matching funds to pay for "continuing to campaign" expenses after the candidate's DOI.

KFP submitted two written responses disputing and seeking administrative review of the Commission's determination. Attachments 2 and 3. KFP makes four main arguments why there should be no repayment or a lesser repayment. *See id.* First, KFP asserts that the Commission should allow it to use private contributions raised after July 29, 2004 to pay for continuing to campaign expenses. KFP makes a related argument that the issue is not resolved by the statute or regulation and that if the law is vague or the regulation is deficient, the Commission should set policy concerning the continuing to campaign exception through a rulemaking rather than in the audit and repayment process. Attachment 2 at 3-4, Attachment 3 at 1-3. Third, KFP argues that the calculation of funds available to pay for its continuing to campaign expenditures should include the "non-public portion," made up of private contributions, of its cash on hand as of the candidate's DOI. Finally, KFP contends that the amount of its continuing to campaign expenses should be lower because it submitted documentation supporting a reduction and the Commission did not explain why it did not accept the Committee's calculation.

¹ The Audit Report also recommended that the Committee pay \$1,840 to the United States Treasury for receipt of anonymous cash contributions in excess of the limitations that were not properly disposed. Although KFP also contests this payment, the Commission is not addressing it in this Statement of Reasons because it is not a repayment determination and thus, is not subject to the administrative review process. *See* 11 C.F.R. § 9038.2(c).

III. REPAYMENT DETERMINATION UPON ADMINISTRATIVE REVIEW

After reviewing KFP's response, the Commission has modified its repayment determination and determines upon administrative review that KFP must repay \$52,443 to the United States Treasury. *See* 26 U.S.C. § 9038(b)(2). KFP used at least \$175,696 in funds containing a portion of matching funds to pay for "continuing to campaign" expenses and must repay the portion representing matching funds. The Commission reaches this conclusion because the Commission found that KFP received an insufficient amount of private contributions after the candidate's DOI to pay for all of its continuing to campaign expenses. KFP, therefore, paid some of those expenses with matching funds. Because matching funds cannot be used to pay for continuing to campaign expenses, these expenses were non-qualified campaign expenses that are subject to a *pro rata* repayment. *See* 26 U.S.C. § 9038(b)(2); 11 C.F.R. 9038.2(b)(2). The Commission, thus, determines that KFP must repay \$52,443 to the United States Treasury.

In the Audit Report, the Commission previously made a repayment determination of \$135,518. For the reasons outlined below, as a result of its administrative review, the Commission has determined to exercise its discretion, modify its determination, and require a repayment of only \$52,443.

A. KFP DID NOT RAISE ENOUGH PRIVATE CONTRIBUTIONS TO FINANCE CONTINUING TO CAMPAIGN EXPENSES

KFP spent more on continuing to campaign expenses than it raised in private contributions dated after the DOI. Since the candidate's DOI of March 4, 2004, KFP raised \$1,725,613. Of that amount, \$1,447,294 was raised between the DOI and the date of the party's nomination on June 29, 2004; the rest was raised subsequently. From the DOI forward, KFP

spent \$1,901,309 on continuing to campaign expenses. Because KFP did not receive sufficient private contributions to cover the total amount that it spent on continuing to campaign expenses, it had to use matching funds to pay for some of those expenses instead. Continuing to campaign expenses are by definition non-qualified campaign expenses because they are incurred after the candidate's DOI, *see* 11 C.F.R. §§ 9034.4(a)(3) and (b)(3), except that the continuing to campaign exception provides that “[e]ach contribution that is dated after the candidate’s date of ineligibility may be used to continue to campaign[.]” 11 C.F.R. § 9034.4(a)(3)(ii). Thus, the amount spent on continuing to campaign expenses in excess of the amount of private contributions received after the DOI constituted non-qualified campaign expenses. Matching funds comprised some proportion of that amount, and where funds are spent on non-qualified campaign expenses the proportion representing matching funds must be repaid to the United States Treasury.

The Commission’s repayment determination of \$135,518 in the Audit Report was based on the conclusion that the “continuing to campaign” exception ends when the candidate ceases to campaign. In KFP’s case, that date was July 29, 2004, the date of the Democratic Party’s nomination.

KFP’s principal argument in opposition to the determination in the Final Audit Report notes that the continuing to campaign regulation refers only to “[e]ach contribution that is dated after the date of ineligibility,” without reference to any end date. KFP asserts that its continued fundraising after the date of the Democratic Party’s nomination enabled it to eventually raise sufficient private funds to replace any matching funds “initially used” for continuing to campaign expenses. *See* Attachment 2 at 2.

As a general matter, the Commission is not persuaded by this approach. First, at the time the funds were actually spent, KFP had not raised sufficient private contributions to cover its continuing to campaign costs. As just noted, this meant that the actual funds disbursed in excess of the amount raised necessarily contained some proportion of matching funds, and money containing matching funds may not be spent on non-qualified campaign expenses.

Second, KFP's statement that the continued fundraising enabled it to eventually raise sufficient private funds to replace any matching funds "initially used" for continuing to campaign expenses is not factually correct. Even if the Commission extends the continuing to campaign exception indefinitely as KFP proposes, and includes all private contributions that KFP received from DOI, past the date of nomination, to the present, KFP's continuing to campaign expenses still exceed the amount of post-DOI private contributions by \$175,696, which would result in a modified repayment determination.

Third, policy considerations militate against extending the "continuing to campaign exception" to private contributions received after the date of the relevant party's nomination. In interpreting the "continuing to campaign" provision the Commission must balance the candidate's right to continue to seek his or her party's nomination after being declared "ineligible" for public funding purposes, and his or her concurrent interest in being able to raise and spend funds to continue to campaign after the date of ineligibility, *LaRouche v. Federal Election Commission*, 28 F.3d 137 (D.C. Cir. 1994), with its obligations to protect and preserve public funds and to apply the law equitably to all candidates.

When private contributions are used to finance continuing to campaign expenses those private contributions are, in effect, excluded from the mixed pool of private and public funds that are used to pay winding down expenses and pay debt incurred prior to DOI. As a consequence

of excluding the private contributions, the amounts used to pay the pre-DOI debt and winding down expenses will necessarily contain a higher proportion of public funds than they otherwise would. This effect is in tension with a central tenet of the matching funds system: that public funds will be used to defray a certain proportion of qualified campaign expenses, but not more. *See* Explanation and Justification for 11 C.F.R. 9034.4, 44 Fed. Reg. 20339 (Apr. 4, 1979). It also means that public funds will fund some greater proportion of payments for pre-DOI debt and for wind-down costs for the “continuing to campaign” candidate than for the candidate, in a similar financial situation, who chooses not to continue to campaign.

In 1991, the Commission essentially determined that while a candidate is in fact continuing to campaign, the candidate’s right to do so outweighs whatever negative consequences flow from these effects. The alternative would be to return to the pre-1991 regulatory regime, in which a candidate who continued to campaign was virtually guaranteed to have to make a repayment.² Explanation and Justification for 11 C.F.R. 9034.4(a)(3)(ii), 56 Fed. Reg. 35905 (Jul. 29, 1991). So as not to unduly burden a candidate’s right to continue to campaign, the Commission adopted a system that allows candidates to raise and spend as much in private contributions as they can during the continuing to campaign period, as long as the private contributions they receive exceed the amounts they spend on continuing to campaign expenses. 11 C.F.R. § 9034.4(a)(3)(ii); *see* Explanation & Justification for 11 C.F.R. § 9034.4(a)(3)(ii), 56 Fed. Reg. 35898, 35905 (Jul. 29, 1991).

² Prior to adopting the continuing to campaign regulation in 1991, the Commission reasoned that private contributions could not be used for continuing to campaign because the private contributions could not be separated from the public funds with which they were commingled in the candidate’s accounts. The Commission also reasoned that the use of private contributions in such a manner would affect the candidate’s entitlement. *See* Explanation and Justification for 11 C.F.R. 9034.4, 56 Fed. Reg. 35905 (Jul. 29, 1991).

But once the candidate is no longer continuing to campaign, the balance shifts. At that point, the candidate is winding down the campaign, rather than actually campaigning. The purpose for which the “continuing to campaign” exception was created is no longer operative. Extending the exception beyond the date of withdrawal or nomination would mean that private contributions raised during the wind-down would, until all continuing to campaign debt was paid, not be available for winding down expenses. Explanation and Justification for 11 C.F.R. 9034.4(a)(3)(ii), 56 Fed. Reg. 35905 (Jul. 29, 1991). This would increase even further the proportion of public funds used for wind-down costs. *Id.* Moreover, of two candidates who were winding down, it would provide a higher proportion of public funds in each wind-down dollar spent by the one who had continued to campaign than in each spent by the one who had not. Because the candidate is no longer continuing to campaign, the balance of interests shifts away from the candidate. In particular, because the continuing to campaign exception allows the candidate to spend as much as he or she can raise *during* the continuing to campaign period, returning to the ordinary rules *after* that period should not be viewed as burdening the candidate’s ability to continue.

Accordingly, the Commission concludes that the “continuing to campaign” exception ends when the candidate ceases to campaign, or at the latest, on the date of the nomination of a candidate by the relevant political party. Here, the continuing to campaign period would have ended for KFP when the candidate ceased to campaign on the date of the Democratic Party’s nomination, July 29, 2004. Based on that date, KFP spent \$454,015 on non-qualified campaign expenses, and would have to repay \$135,518. This analysis is consistent with the analysis of a similar issue in a previous election cycle. *See* Statement of Reasons – Keyes 2000, Inc.

(approved Mar. 4, 2004) (Repayment for the *pro rata* amount spent in excess of funds received during the continuing to campaign period).

Nevertheless, the Commission recognizes that section 9034.4(a)(3)(ii) does not explicitly state when the “continuing to campaign” exception ends. KFP has argued that the Commission should not set new policy in an audit or apply that policy retroactively. Because no audit has turned on the end date of the “continuing to campaign” exemption, the Commission has not spoken directly to the point raised by KFP. Moreover, resolution of the administrative review in this matter has taken an extended period of time. Accordingly, given the circumstances of this particular case, the Commission determines to exercise its discretion by applying the “continuing to campaign” provision to all of KFP’s post-DOI private contributions. Going forward, however, the Commission will apply the “continuing to campaign” exception only to contributions dated between DOI and the date a candidate ceases continuing to campaign, which can be no later than the date of the nominating convention, although it may be earlier.

B. CONTRIBUTIONS RECEIVED PRIOR TO DOI CANNOT BE USED TO CONTINUE TO CAMPAIGN

KFP also contends that what it calls the “non-public portion” of its cash on hand as of the DOI, by which it means contributions from individuals, should be considered available to pay for continuing to campaign expenditures. Attachment 2 at 4. KFP used the repayment ratio to calculate a portion of the cash on hand as of DOI that was made up of “non-public” contributions. Generally, the repayment ratio is used to calculate the repayment of matching funds for non-qualified campaign expenses. 11 C.F.R. § 9038.2(b)(2)(iii). The basic premise is that candidates pay all expenses from a mixed pool of matching funds and private contributions, but must repay only the proportion of matching funds used. *See Kennedy for President v. FEC*,

734 F.2d 1558, 1562 (D.C. Cir 1984). KFP reversed the repayment ratio to calculate the proportion of funds in the mixed pool that are *not* matching funds; thus, it contends that as the repayment ratio of 29.8488% represents matching funds, the remainder of 70.1512% is not matching funds. KFP multiplied the total cash on hand as of DOI including contributions dated before the DOI but deposited after that date (\$365,397) by 70.1512% to calculate the “non-public” portion of the cash on hand that it asserts was derived from contributions, \$256,330. KFP contends that adding this \$256,330 to the contributions available to pay for continuing to campaign expenses would reduce its repayment.

The Commission is not persuaded by this argument because it contradicts the language of the Commission’s continuing to campaign rule. None of KFP’s cash on hand as of the DOI could be used for continuing to campaign expenses. The continuing to campaign exception in section 9034.4(a)(3)(ii) states that the funds that “may be used to continue to campaign” are those contributions “dated after the candidate’s date of ineligibility.” KFP’s cash on hand as of the candidate’s DOI does not include any contributions dated after that date, and thus, may not be used to pay for any continuing to campaign expenses. While some portion of the Committee’s cash on hand as of the DOI was “non-public” in that it was made up of private contributions, those private contributions cannot be separated out to be used for continuing to campaign expenses. The cash on hand as of the DOI was a mixed pool of matching funds and contributions, which could only be used to pay for qualified campaign expenses. *See* 11 C.F.R. § 9034.4(a)(1). The expenses related to continuing to campaign were incurred after DOI and

would be non-qualified campaign expenses if paid with funds that contained any portion of matching funds. *See* 11 C.F.R. §§ 9034.4(a)(3) and (b)(3), 9038.2(b)(2)(ii)(D).³

C. PAYMENTS FOR CONTINUING TO CAMPAIGN EXPENSES USING FUNDS CONTAINING MATCHING FUNDS WERE NON-QUALIFIED CAMPAIGN EXPENSES

The Commission concludes that KFP used matching funds to pay expenses related to the candidate's continuing to campaign efforts. The Commission calculates that the private contributions KFP received after the DOI total \$1,725,613 and that KFP's continuing to campaign expenses total \$1,901,309. The Commission, therefore, concludes that KFP used funds containing a portion of public funds to pay \$175,696 (\$1,901,309 - \$1,725,613) in continuing to campaign expenses. Since continuing to campaign expenses are nonqualified campaign expenses and KFP has a repayment ratio of 29.8488%⁴, KFP must make a pro rata repayment of \$52,443 to the United States Treasury. 11 C.F.R. 9038.2(b)(2).

KFP contends that it has less continuing to campaign expenses, and that it submitted documentation in support of this position. The Commission has considered KFP's arguments and documentation, and the Commission concludes that no further reduction is warranted to the amount of continuing to campaign expenses.

The Commission concluded in the Audit Report that the total amount of KFP's continuing to campaign expenses was \$1,901,309, a reduction of \$34,005 based on KFP's

³ Several of KFP's other contentions in support of its proposal are ultimately unpersuasive. *See* Attachment 2 at 2-3. For example, although KFP correctly observes that the use of funds to continue to campaign is linked to the calculation of a candidate's entitlement, its contention that it was somehow penalized by the Commission's entitlement calculation is unpersuasive. The Commission's decision in this matter might have had a detrimental impact on the candidate's entitlement to matching funds if the Commission had sought a repayment for funds received in excess of entitlement, or if the Commission had reduced the actual matching fund payments. The calculation of the candidate's net outstanding campaign obligations in the Commission's Audit Report, however, concluded that Kucinich did not receive matching funds in excess of his entitlement. Indeed, KFP had remaining entitlement and its matching fund payments were never reduced based on insufficient entitlement.

⁴ The Commission's Audit Report reflects the calculated the repayment ratio. Attachment 1 at 15.

response to the Preliminary Audit Report (“PAR”). KFP argues that some of the \$1.9 million were not continuing to campaign expenses, but instead were campaign expenses from before the DOI. KFP contends that it submitted documentation in response to the PAR supporting a \$64,490 reduction in the amount of its continuing to campaign expenses, but the Commission only reduced those expenses by \$34,005. KFP argues that the Commission did not explain in the Audit Report why the reduction was limited to \$34,005, requests that it be informed of which items were not accepted, and argues that it provided sufficient documentation to support the \$64,490 reduction. Attachment 2 at 1.

The Commission concludes that KFP’s documentation supports a reduction of only \$34,005. KFP provided invoices for expenses it contended were for services provided before the DOI but billed to KFP after that date. Although the Commission reduced the total by \$34,005 for pre-DOI expenses, its review of these invoices produced different amounts than the Committee’s calculations. The details of the Commission’s review and the amounts the Commission did not accept are explained in the attached schedule. Attachment 5; *see also* Attachment 4. For expenses related to both the pre-DOI and post-DOI periods, the Commission calculated the pre- and post-DOI amount of the expense and applied only the post-DOI portion to continuing to campaign expenses. However, its calculations differed from KFP’s calculations. For some expenses, KFP provided no documentation to support its calculations. Attachments 4 and 5. In other instances, the invoice indicated the expense was incurred and paid during the continuing to campaign period. *Id.* The Commission provided KFP a schedule of the expenses detailing its review of the Committee’s proposed reductions to the continuing to campaign expenses and showing the Audit staff’s calculations by electronic mail on August 13, 2007. Attachment 5. The schedule included notations, such as “no documentation,” explaining why the

Commission did not accept the Committee's proposed reductions to particular expenses.

Therefore, the amount of KFP's continuing to campaign expenses remains at \$1,901,309. Thus, KFP must repay \$52,443 to the United States Treasury.

IV. CONCLUSION

Based on the foregoing, the Commission has determined that Dennis J. Kucinich and Kucinich for President, Inc. must repay \$52,443 to the United States Treasury for non-qualified campaign expenses. 26 U.S.C. § 9038(b)(2); 11 C.F.R. 9038.2(b)(2).

Attachments

1. Audit report approved March 8, 2007
2. Kucinich for President, Inc. Response dated May 7, 2007
3. Kucinich for President, Inc. Response dated May 29, 2007
4. Memorandum "Audit Comments Regarding Kucinich for President, Inc.'s Response to Repayment Determination" (Sept. 4, 2007)
5. Electronic mail from Audit Division to Donald J. McTigue (Aug. 13, 2007).