State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

OWEN V. McNANY, III
CHAIRMAN

DAVID LINETT
COMMISSIONER

WILLIAM H. ELDRIDGE
COMMISSIONER

NATIONAL STATE BANK BLDG., 12th FLOOR
28 W. STATE STREET, CN 185
TRENTON, NEW JERSEY 08625-0185
(609) 292-8700

FREDERICK M. HERRMANN, PH.D.
EXECUTIVE DIRECTOR

JEFFREY M. BRINDLE
DEPUTY DIRECTOR

GREGORY E. NAGY
LEGAL DIRECTOR

EDWARD J. FARRELL
COUNSEL

December 16, 1993

Michael R. Cole, Esq.
Riker, Danzig, Scherer, Hyland &
Perretti
Headquarters Plaza
One Speedwell Avenue
P. O. Box 1981
Morristown, New Jersey 07962-1981

Advisory Opinion 11-1993

Dear Mr. Cole:

The Commission has directed me to issue this response to your recent request for an advisory opinion. You have asked three questions concerning postelection fundraising and spending by People for Whitman (hereafter, PFW) the 1993 general election campaign committee of publicly-financed gubernatorial candidate Christine Todd Whitman. This committee is incurring unanticipated legal and accounting fees associated with its defense of postelection proceedings and litigation; see In the Matter of Democratic National Committee v. Republican National Committee (New Jersey District Court, No. 93-4992). The litigation appears to raise issues which concern campaign reporting by the Whitman campaign.

You have first asked whether or not PFW may continue to raise and spend funds in a postelection setting to pay legal and other fees arising from the postelection litigation and proceedings. Questions concerning postelection spending by a publicly-financed gubernatorial campaign arise because Commission regulations require that such spending be limited to two categories of expenditures: satisfaction of outstanding obligations for appropriate campaign expenses occurred on or before the date of the election and payment of reasonable and necessary costs of closing the campaign; see N.J.A.C. 19:25-15.47(b). Costs associated with litigation are not specifically enumerated among the permissible postelection uses of gubernatorial campaign funds.

The Commission finds that PFW may continue to solicit contributions in the postelection setting, but that all contributions raised must observe

the $1,800 contribution limit for a publicly-financed 1993 gubernatorial general election candidate. Postelection receipt of contributions by a publicly-financed gubernatorial general election campaign is permitted by Commission regulations as long as compliance with the $1,800 contribution limit for the 1993 general election is observed; see N.J.A.C. 19:25-15.45. In Advisory Opinion No. 47-1981, the Commission was asked if a publicly-financed gubernatorial candidate could raise funds in a postelection setting to retire campaign debts. The Commission responded that funds could be raised as long as compliance with the contribution limit (then $800) was maintained. Therefore, the Commission concludes that as long as contributions received by PFW are monitored for compliance with the $1,800 contribution limit and other reporting requirements of the Act, receipt of contributions by PFW in a postelection setting is permissible.

You have further inquired whether PFW funds may be expended in a postelection setting to pay for costs associated with litigation and related proceedings, and whether those expenditures are to be counted toward the 1993 general election $5.9 million expenditure limit of a publicly-financed gubernatorial candidate. The Commission believes that such disbursements are permissible as long as the litigation and proceedings have some reasonable nexus to the candidacy or reporting requirements applicable to the 1993 general election campaign of Christine Todd Whitman.

Publicly-financed gubernatorial campaigns are permitted to retain funds for six months after an election to liquidate the obligations of a campaign; see N.J.S.A. 19:44A-35c. All funds remaining must then be returned to the State. N.J.A.C. 19:25-15.47(b) therefore restricts postelection spending by a publicly-financed gubernatorial campaign to disbursements for the payment of obligations entered into on or before the election date or for the payment of reasonable and necessary costs to close the campaign. However, neither the statute nor the regulation contemplated the campaign-related postelection expenses which form the basis of your inquiry. Historically, the Commission has permitted a publicly-financed gubernatorial campaign to retain funds sufficient to pay legal fees and court costs arising out of unexpected postelection litigation even after the expiration of the six-month period. For example, the 1985 gubernatorial general election campaign of Peter Shapiro asked for and received Commission approval to retain funds beyond the six-month, statutory return period to pay costs associated with defense of a lawsuit brought by a vendor against the campaign.

The Commission further finds that the disbursements by PFW to pay the costs of the postelection litigation and proceedings you have described do not count toward the $5.9 million expenditure limit which PFW is required to observe as a condition of its receipt of 1993 general election public matching funds. As long as the litigation is related to or arises from allegations concerning compliance by PFW with the campaign reporting obligations imposed upon the Whitman 1993 gubernatorial general election campaign by the New Jersey Campaign Contributions and Expenditures Reporting Act (N.J.S.A. 19:44A-1, et seq), the Commission believes that the $5.9 million expenditure limit is inapplicable; see N.J.A.C. 19:25-15.26.

You have next asked whether PFW may deposit into its campaign bank

account contribution checks received more than ten days ago. The Reporting Act specifically requires that all contributions to a campaign be deposited into a campaign account no later than the tenth day after receipt by a candidate; see N.J.S.A. 19:44A-9. You have stated that certain contributions received by PFW were intended to be returned to the contributors. However, you have indicated that they are apparently now needed to meet the costs associated with the defense in the postelection litigation and proceedings described above. You therefore seek Commission approval for PFW to deposit the contributions into the PFW matching fund account on a date later than the tenth day after their receipt.

Literal application of N.J.S.A. 19:44A-9 to the facts you have presented would require that PFW return the contributions which have not been timely deposited. PFW would, however, be permitted to once again solicit the same contribution amounts. Under the unique circumstances presented by the postelection litigation, the Commission concludes that the salutory purposes of the statute requiring deposit of contributions within ten days are not frustrated by permitting PFW to deposit those specific contribution checks more than ten days after their receipt.

The Commission understands that the legislative purpose which underlies N.J.S.A. 19:44A-9 is to ensure that all contributions to a candidate are properly deposited and timely reported. However, PFW could not reasonably have foreseen prior to the date of the 1993 general election the need for funds sufficient to meet the unanticipated postelection litigation expenses it now faces. As a publicly-financed gubernatorial campaign, PFW knew that its spending was limited by the $5.9 million 1993 general election expenditure ceiling. At the time of its receipt of these contributions, PFW therefore understood that the $5.9 million limit would prevent its use of these contributions, and PFW had no reason to believe that it would be permitted to spend the additional campaign contributions. Therefore, its intent to return contributions without negotiating or depositing them was reasonable in these circumstances. The Commission therefore waives the ten-day deposit rule as it applies to the specific contributions which form the basis of your inquiry, provided the contributions are deposited within 10 days of receipt of this opinion.

In your final question, you have asked whether "lawyers, law firms, accountants and accounting firms" may make "in-kind" contributions of their professional services to PFW in relation to the postelection litigation and proceedings if those professional corporations or individual professionals or partners have already made maximum $1,800 contributions to PFW in the 1993 general election.

The Reporting Act, and Commission regulations promulgated pursuant to it, provide a framework for analysis of the contribution limit question you have. The statute and regulations permit each contributor to make a contribution or contributions to a 1993 gubernatorial candidate in an amount not to exceed $1,800 in the aggregate; see N.J.S.A. 19:44A-29 and N.J.A.C. 19:25-15.12(a).

Where an individual provides voluntary uncompensated personal

services to a campaign, including legal and accounting services, those services are not considered contributions for the purposes of the Act and the services do not count in a calculation of the contribution limit applicable to the contributor; see N.J.S.A. 19:44A-3(f) and N.J.A.C. 19:25-11.5(c). Therefore, in Advisory Opinion No. 14-1984 (copy enclosed), the Commission held that professional services performed by an individual on a voluntary basis are not reportable contributions, but those services performed by non-volunteering, compensated attorneys or accountants or other persons compensated by a contributing professional are "paid personal services" under the statute and must be reported as contributions and are subject to the contribution limit; see Advisory Opinion No. 14-1984.

The Commission therefore similarly concludes that if professional legal, accounting, or support services are provided as "in-kind" contributions to PFW in connection with postelection litigation or proceedings, that is such services are not voluntarily provided, the value of those services must be counted as contributions to PFW subject to the $1,800 contribution limit.

Under the Act and Commission regulations, a corporation, including a professional corporation, is considered a contributor. Therefore, each legal or accounting firm which is a corporation may contribute no more than the $1,800 maximum contribution permitted to a 1993 gubernatorial general election candidate. Commission regulations require that contributions to a gubernatorial candidate from a partnership entity must be counted toward the $1,800 contribution limit of an individual partner; see N.J.A.C. 19:25-15.15(c). Therefore, if an "in-kind" contribution of non-voluntary services is provided to PFW by a law firm or accounting firm which is a partnership, the contribution must be attributed to a partner or partners who have not already made a maximum $1,800 contribution.

Thank you for your inquiry.

Very truly yours,

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION

By: NGM Massar
NEDDA GOLD MASSAR
Deputy Legal Director

NGM/jah

enclosure