



State of New Jersey

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January 29, 1998

Len Flynn, Deputy Treasurer
Sabrin for Governor
254 Tennent Road
Morganville, New Jersey 07751

Advisory Opinion No. 02-1998

Dear Mr. Flynn:

The Commission has considered your request for an advisory opinion submitted on behalf of Sabrin for Governor (hereafter, SFG), the 1997 general election candidate committee of Murray Sabrin, a gubernatorial candidate who participated in public financing, and has directed me to issue the following response. You have asked whether or not SFG may make a postelection refund of a contribution in an amount you have not disclosed to a contributor you have not identified. For the reasons set forth below, kindly be advised that on the fact record submitted in this request the contemplated refund cannot be made. However should the SFG candidate committee submit in writing a more complete factual basis as described herein which gives compelling reasons why the Commission should waive the prohibition against the contemplated refund, the Commission will take that record under consideration.

Submitted Facts

You write that the purpose of the request is to clarify the status of refunds of contributions, which refunds are sought by contributors after the date of the election. You have indicated that the SFG candidate committee has received a request from a contributor for a refund because the contributor recently discovered that his employment is jeopardized by the making of the contribution. The identity of the contributor, the amount contributed and the specific reasons that the contributor's employment may be placed in jeopardy have not been provided in your request. Also not provided is any information as to whether or not this specific contribution received a two-for-one dollar match pursuant to matching fund provisions of the public financing program, see N.J.S.A. 19:44A-33b. You note that the SFG treasurer received a letter from the Commission, dated November 6, 1997, a date immediately following the November 4, 1997 general election, advising SFG of regulations which restrict

postelection spending of gubernatorial candidates who participated in public financing. The Commission's file copy of that letter is enclosed.

The most recent report filed by SFG on November 24, 1997 (i.e., gubernatorial candidate committee 20-day post election report, Form G-1) indicates that the candidate committee has a remaining unspent balance of \$32,807.43, and outstanding obligations of \$26,502.85. SFG has to date received a total of \$537,107.80 in public funding for the 1997 gubernatorial candidacy of Mr. Sabrin.

Question Presented

Is it permissible for a publicly financed gubernatorial candidate committee to make a discretionary refund of a contribution amount to the contributor after the date of the election in which the candidate was seeking office?

Response

SFG is advised that postelection refunds of contributions by a publicly financed gubernatorial candidate are prohibited by public financing regulations which protect the interest of the State in the return to it of unspent contributions up to the amount awarded to a publicly financed candidate. However, if there are compelling reasons why the Commission should consider waiving the prohibition and permit the refund of this specific contribution, the identity of the contributor, whether or not the contribution generated two-for-one matching public funds for the SFG candidate committee, and the particular facts surrounding the employment circumstances of the contributor must be submitted in writing to the Commission.

Discussion

A gubernatorial candidate who qualifies for and opts to participate in the public financing program (hereafter, a "qualified candidate") may retain moneys received from the Gubernatorial Elections Fund (see N.J.S.A. 54A:9-25.1 establishing the Fund) for a period not to exceed six months after the election, see N.J.S.A. 19:44A-35c. The statute provides that after liquidation of the candidate committee obligations, all funds remaining available to the qualified candidate shall be paid into the Gubernatorial Elections Fund, that is returned to the State, in an amount not to exceed the amount of public funds provided to the qualified candidate. The Commission, as the agency charged with the responsibility of administering the public financing program, promulgated a regulation to protect the State's interest in the return of public funds provided to a publicly financed gubernatorial candidate, see N.J.A.C. 19:25-15.47, Repayment of public or other funds. Subsection (b) of that regulation restricts postelection uses of those funds as follows:

- (b) No candidate who has received public funds shall incur any debt or make any expenditure after the date of the election for any purpose other than the following:

1. To satisfy outstanding obligations incurred on or before the date of the election made for appropriate campaign purposes; or
2. To pay the reasonable and necessary costs of closing the campaign.

Applying the above-quoted regulation to the submitted facts, nothing in the record suggests that SFG had made a commitment to refund this contribution prior to the date of the election, and thus it was not an outstanding obligation as of the date of the election. Further, the contemplated refund does not constitute a reasonable and necessary cost of closing the campaign because the making of the refund is not legally compelled and would be a discretionary act of the candidate committee.

In your request, you suggest that the discretionary refund of a contribution by a candidate committee does not come under the statutory (N.J.S.A. 19:44A-3d) or regulatory (N.J.A.C. 19:25-1.7) definitions of the term "expenditure." However, you have not offered any statutory interpretation in support of that view. The Commission does not discern any basis for such a result. N.J.S.A. 19:44A-3d, in pertinent part, provides that all transfers of money or other thing of value by a candidate committee are included within the definition, as are pledges or commitments to make such transfers. N.J.A.C. 19:25-1.7 states that the term "expenditure" includes "...every transfer of money or other thing of value, including any item of real or personal property, tangible or intangible, made by any candidate committee...and any pledge or other commitment or assumption of liability to make such transfer." Neither definition explicitly or implicitly provides an exception for a refund of a contribution.

You have also asked whether such a refund can be made by check from the public funds account that must be maintained solely for public funds (see N.J.A.C. 19:25-15.20), or from the candidate committee depository account maintained for all other transactions. However, since the Commission finds that the contemplated refund is not permitted, this question becomes moot. Similarly, your question seeking clarification that a postelection refund is discretionary is moot in the sense that nothing in the fact record submitted in this request suggests that the SFG candidate committee is compelled as a matter of law to make this refund, or to treat the proceeds of the contribution as a loan subject to repayment. In the absence of any legal obligation to repay the proceeds, a refund or repayment made to the contributor must be by definition a discretionary act of the SFG candidate committee.

You have also requested an explanation of what "deficiencies" in a contribution compel refund or remittance to the State. In regard to the facts submitted in this inquiry, you have offered limited information pertinent to this specific contribution. Nothing in the record of this request suggests that the contribution that is the subject of the contemplated refund omitted required information, was from an impermissible source, or otherwise suffered from any "deficiency." Although you have made the representation that the employment of the contributor may be in jeopardy in the absence of a refund, you have not explained how that jeopardy arises, or any specifics of the contributor's employment circumstances. Accordingly, your request for permission to make this refund is denied in the absence of a fact record containing reasons why the State's interest in the return to it of publicly awarded candidate funds should be waived.

Please do not hesitate to call upon the Commission's staff if you wish to provide further information. Thank you for your inquiry.

Very truly yours,

ELECTION LAW ENFORCEMENT COMMISSION

By: _____

Gregory E. Nagy