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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	No. O-06-016
Opinion Requested by	)	April 24, 2006
Ash Pirayou	)	
	)	

BY THE COMMISSION: Former Assemblymember Ellen Corbett has requested an opinion from the Fair Political Practices Commission on behalf of herself and two of her committees, Friends of Ellen Corbett for Assembly – No. 980193 ("Assembly Committee") and Friends of Ellen Corbett – No. 1253363 ("Senate Committee").

I. QUESTION

May Ms. Corbett, with attribution, transfer "surplus campaign funds" remaining in her Assembly Committee to her Senate Committee if the money became surplus due to her treasurer's gross negligence in applying the Political Reform Act ("Act")?[1]

II. CONCLUSION

Under the extraordinary circumstances presented by Ms. Corbett, the Commission concludes that the funds may be transferred with attribution.

III. FACTS[2]

Ellen Corbett ("Ms. Corbett") was first elected as a member of the California State Assembly on November 3, 1998. Ms. Corbett served in the Assembly three consecutive two-year terms until her last term expired on November 30, 2004.

The Friends of Ellen Corbett for Assembly ("Assembly Committee") was used as the candidate controlled committee for all three of Ms. Corbett's elections to the California Assembly. On February 14, 2003, Ms. Corbett also established the Friends of Ellen Corbett committee ("Senate Committee") for purposes of her candidacy to the California State Senate in 2006.

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[1] All references are to the Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109 – 18997, California Code of Regulations.

[2] These facts are based upon the following information provided by Mr. Pirayou: (1) January 26, 2006, Request For Opinion ("Request"), including declarations submitted by Ms. Corbett and her treasurer, Rita Copeland; (2) March 10, 2006, supplemental submission; and (3) March 14, 2006, argument to the Commission. The Commission does not act as a finder of fact when it issues a legal opinion. (*In re Oglesby* (1975) 1 FPPC 71.) Our opinion is applicable only to the extent that the facts provided to us are correct and that all of the material facts have been provided.

On June 10, 2003, Ms. Corbett retained Rita Copeland of River City Business Services ("Treasurer") for treasurer and professional accounting services for both the Assembly and Senate committees. Amended Form 410's were filed for both committees to reflect the change in the treasurer position. The Treasurer obtained complete possession over the funds and records of both committees. As of December 31, 2004, or one month after Ms. Corbett's last term in the Assembly ended, the cash balance for her Assembly Committee was $97,851.43.

Prior to the expiration of her final term in the Assembly on November 30, 2004, Ms. Corbett, or members of her campaign staff, repeatedly asked her Treasurer to transfer the cash balance in her Assembly Committee to her Senate Committee. Ms. Corbett avers that: "beginning in March 2004 through November 2004, I, or my campaign staff, made at least six different attempts to contact the Treasurer by telephone to specifically ask that the transfer of funds take place and to inquire about the appropriate timeline for such transfer." (1/26/06 Declaration of Ellen Corbett, ¶10.) The Treasurer confirms that during the same period of time, Ms. Corbett or a member of her staff contacted her on "a number of occasions," inquiring about the funds to be transferred. (1/26/06 Declaration of Rita Copeland, ¶8.)

Each time the Treasurer was contacted, Ms. Corbett, or her campaign staff, was assured that there was ample time to transfer the funds. The Treasurer's belief was based upon an erroneous application of regulation 18404.1(b)(1). That regulation indicates that candidate controlled committees with net debts outstanding "must be terminated no later than 9 months after the earliest of the date the candidate is defeated, leaves office or the term of office for which the committee was formed ends. . . ."

The Assembly Committee funds were not transferred to the Senate Committee before Ms. Corbett's state Assembly term of office expired. Therefore, on November 30, 2004, the Assembly Committee funds became "surplus funds" pursuant to section 89519. In April 2005, Ms. Corbett discovered that the deadline for transfer of the funds had passed. The Treasurer confirmed that she had made an error and that Ms. Corbett was now prohibited from transferring the surplus funds.

As of January 26, 2006, the balance of funds in the Assembly Committee account was $81,617. Ms. Corbett had no other intention or purpose for the substantial balance of funds in the Assembly Committee account other than the transfer and use by the Senate Committee. Ms. Corbett relied on the erroneous advice of her professional Treasurer who believed the funds would become surplus nine months after Ms. Corbett left office instead of at the end of her last term in office. If the transfer of funds is permitted by the Commission, the Senate Committee intends to fully disclose the transfer with attribution using the appropriate accounting method described in section 85306 and regulation 18536.

On June 17, 2005, Ms. Corbett sought written advice from Commission staff requesting relief for the consequences of the "gross negligence" of her Treasurer. On July 8, 2005, the Commission staff issued an advice letter opining that transfer was not

permissible under the provisions of the surplus funds statute – section 89519. (*Pirayou* Advice Letter, No. A-05-125.) On January 27, 2006, Ms. Corbett and her committees, through her attorney, Ash Pirayou ("Requestor") asked the Commission to permit the transfer.

The primary contest in which Ms. Corbett will be running for state Senator will occur in June 2006. The Requestor represents that Ms. Corbett's campaign is highly contested and that she has never been prosecuted for any violations of the Act.

IV. ANALYSIS

A. The Surplus Campaign Funds Statute.

The "personal use of campaign funds" provisions in the Act regulate the appropriate use of campaign funds. (Sections 89510-89522.) Generally, campaign funds must bear at least a reasonable relationship to a political, governmental, or legislative purpose. Specified expenditures, such as those that confer a substantial personal benefit on a candidate or committee, must bear a direct relationship to these purposes.

Section 89519 specifies when campaign funds controlled by a candidate or elected officer become surplus, thereby limiting the use of the funds to specified purposes. Subdivision (a) states:

> "Upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer shall be considered surplus campaign funds and shall be disclosed pursuant to Chapter 4 (commencing with Section 84100)."

Subdivision (b) of section 89519 states, "Surplus campaign funds shall be used only for the following purposes . . ." after which there are six numbered paragraphs listing the ways in which such funds may be spent. Subdivisions (b)(1) through (b)(6) of section 89519 provide for the following permissible uses of surplus campaign funds:[3]

> "(1) The payment of outstanding campaign debts or elected officer's expenses.
> (2) The repayment of contributions.
> (3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on

[3] Subdivision (c), not shown above, describes how costs associated with an electronic security system, for candidates or elected officers threatened with harm, may be paid for with surplus funds pursuant to the definition of "outstanding campaign debts or elected officer's expenses" contained in subdivision (b)(1).

> the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.
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> (4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.
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> (5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure.
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> (6) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation which arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount."

The subdivision most pertinent to the Request, subdivision (b)(5), contains language implicitly prohibiting the use of contributions to support or oppose a specific candidate for elective office in California. The language of subdivision (b)(5) was taken verbatim from a predecessor statute and has therefore been in effect for over 15 years. (See subdivision (e) of former section 85807 [Senate Bill 1431 (Ch. 1452, Stats. 1989) effective January 1, 1990].) Since January 1990, Commission staff has consistently advised that the language (now) contained in section 89519(b)(5) has prohibited a candidate from using "surplus campaign funds" left over from one state or local campaign to fund that same candidate's later campaign for another state or local office in California. (*Leese* Advice Letter, No. A-90-061; *Shade* Advice Letter, No. A-90-449; *Hefter* Advice Letter, No. T-90-582; *D'Elia* Advice Letter, No. I-90-773; *Biggs* Advice Letter No. I-92-445; *Edgerton* Advice Letter, No. A-92-572; and *Spillane* Advice Letter, No. A-95-071.)

Regulation 18951 further states, in pertinent part:

> "(a) Campaign funds raised after January 1, 1989, under the control of a candidate or elected officer shall be considered surplus campaign funds on the following dates:
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> (1) Incumbent Candidates: The date on which an incumbent candidate leaves any elective office for which the campaign funds were raised, or, if the candidate is defeated for reelection, the end of the postelection reporting period following his or her defeat, whichever is later. An incumbent candidate who wishes to use funds for a future

> election must transfer those funds to a new committee for a future election no later than this date."

Therefore, the statute (at subdivision (b)(5)) and regulation 18951 clearly cover the conduct which is the subject of this Request – a transfer from a California candidate's Assembly committee to his or her Senate committee. The approximately $80,000 at issue are "surplus campaign funds" under section 89519.

B. An Overview Of The Commission's Broad Powers To Administer & Implement The Act.

The Commission has longstanding and broad powers to interpret and implement the Act. Section 83111, states that "[t]he Commission has primary responsibility for the impartial, effective administration and implementation of this title." In furtherance of its authority to interpret the Act, section 83112 states, "The Commission may adopt, amend and rescind rules and regulations *to carry out the purposes and provisions of this title*, and to govern procedures of the Commission." (Emphasis added.) Finally, section 81003 states: "This title should be liberally construed to accomplish its purposes."

The courts have elaborated upon such words in the Act, recognizing that the Commission is authorized to act as a quasi-legislative agency entitled to the most deferential level of judicial review. In *Californians for Political Reform Foundation v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472, the appellate court stated that since "the quasi-legislative decisions of the Commission involve controversial issues that would entangle the court in a 'political thicket'," the interpretation of statutes and regulations by an agency, such as the Commission, in the area of its expertise is entitled to "great weight" in the court's analysis unless "clearly erroneous or unauthorized." (*Ibid*. at p. 484.) Such deference follows from a recognition that the judicial branch's areas of expertise to do not always overlap those of legislative and executive branch agencies.

Thus it has long been accepted that the Commission is not shackled by statutes that can only be read and applied with a wooden literalism that permits no appeal to the Act's fundamental purposes. One clear example is provided by section 89001, which was a broad prohibition on "mass mailings" at public expense, enacted in June 1988 by Proposition 73. The statute consisted (and still consists) of just twelve words: "No newsletter or other mass mailing shall be sent at public expense."

Under the definition of "mass mailing" already contained in section 82041.5, it soon became evident that the new statute (read too literally) would bar the state from sending out millions of tax forms, ballot pamphlets, college catalogues, and the like, effectively eliminating the ability of government to communicate with its citizens through the mail. The Commission therefore adopted an emergency regulation (regulation 18901) two months later, listing a comprehensive list of "exceptions" to section 89001 – exceptions that simply did not exist either explicitly or implicitly in the

plain language of section 89001.[4] Not surprisingly, the passage of the regulation triggered litigation that resulted in a published opinion by the Court of Appeals entitled *Watson et al. v. FPPC et al.* (1990) 217 Cal.App.3d 1059.

In *Watson*, the court explained: "Plaintiffs took the position that the FPPC, in promulgating regulation 18901, had impermissibly rewritten section 89001 by creating numerous exceptions and exclusions not authorized by the clear wording of the statute." (*Watson, supra,* at p. 1068.) Nonetheless, the *Watson* court concluded:

> "We agree with the FPPC that the effect of regulation 18901 is to permit the free flow of necessary government information while reducing the political benefit realized by incumbent elected officials from the sending of newsletters and other such mass mailings. This is totally consistent with the FPPC's duty to implement the *intent* and not the *literal language* of the statute." (*Id*. at p. 1076, emphasis in original.)

In other words, under its broad powers to amend and rescind rules and regulations to carry out the purposes of the Act, the Commission can interpret the Act and its implementing rules and regulations to respond effectively to a specific set of facts when necessary. (Section 83112; also see *In re Solis* (2000) 14 FPPC Ops. 7.) Therefore, the Commission is equipped to react in "real time" to address problems that, typically, emerge only in the context of or in close proximity to an election. This is why the Act confers on the Commission a broad grant of authority to consider the fundamental purposes of the Act in addition to the "literal language" of individual statutes, rules and regulations, as the *Watson* court explained. Thus, the Commission's authority to implement the intent of the Act, and not just the strict letter of a statute, is well established.

C. The Commission Concludes That The Assembly Committee Funds May Be Transferred To Ms. Corbett's Senate Committee Account With Attribution.

In the case at hand, Ms. Corbett's Request presents difficult interpretive issues for the Commission. There is no question that Ms. Corbett, and members of her staff, were aware of the Act's requirements that her Assembly Committee funds be transferred at the end of her term, November 30, 2004. Therefore, it is difficult for the Commission to grant her request in light of the literal language of both section 89519 and regulation 18951. Moreover, the Commission's interpretation of this statute is not new, as highlighted by the requests for advice that staff has issued over the years. In addition, Ms. Corbett is permitted to return contributions under the provisions of section 85319. Therefore, upon the return of the contribution, contributors wishing to donate to her Senate campaign would be free to do so.

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[4] In its current form, regulation 18901 is 150 times longer than the apparently simple statute it interprets. It consists of 1,639 words (not including headings or other non-substantive characters), as compared to the eleven words of the statute it interprets.

However, Ms. Corbett establishes the following extraordinary and relevant factual context which the Commission finds persuasive in implementing the overall provisions of the Act:

1. On at least six occasions, Ms. Corbett, or her staff, requested that the committee treasurer make the transfer in accordance with the provisions of section 89519 and regulation 18951. In other words, this is not the case where the conduct was the result of the candidate's negligence or contributory negligence. Here, the candidate was diligent in attempting to seek compliance with the law.

2. In this case, the candidate affirmatively and repeatedly expressed concern to her Treasurer (personally and through the candidate's staff) that the lapse of time could hurt her ability to campaign effectively. The candidate, in turn, was assured by the Treasurer (personally or through her staff) that there was ample time to transfer the funds.

3. The candidate has stated that she is running in a highly contested election in June 2006 and denial of her request will result in severe harm to her candidacy.

4. The candidate comes to us with "clean hands," i.e., this situation does not involve a candidate who has done wrong and is now seeking mercy.

5. Although Ms. Corbett could return contributions to her original contributors and request that they re-donate such funds to her current campaign, it would not make the candidate completely whole again in this highly contested race.

We also examine the apparent fundamental purposes of the surplus funds statute. As noted above, campaign funds may be used if there is either a reasonable or direct relationship to a political, governmental, or legislative purpose. (Sections 89510-89518.) Up to a time certain, these funds may be used by candidates to finance future campaigns. This ensures candidates do not secretly amass campaign funds to finance a future campaign. A timely transfer of the funds permits candidates to express their intention to use collected contributions for a future campaign and it avails the public of information regarding the candidate's campaign strategies. Regulation 18951 sets out a "bright line" for a candidate to express his or her wishes to use funds collected for a future campaign. This expression puts everyone on notice regarding the candidate's intentions.

In the instant case, we find that the candidate's request is not inconsistent with the overall purposes of the surplus funds statute to prevent candidates from using old funds to finance future campaigns. Here, the candidate's expressed desire to use the Assembly Committee funds for her Senate race was known and her intention to abide by the letter of the law is shown by affirmative acts taken by the candidate or her staff.

Therefore, in light of the above and the extraordinary factual scenario described above (paragraphs 1-5), the Commission grants the Request, allowing Ms. Corbett to transfer funds from her Assembly Committee to her Senate Committee, as long as the

committees fully disclose the transfer with attribution using the appropriate accounting methods described in section 85306 and regulation 18536.

The Commission is cognizant that questions have been raised regarding the application of this opinion to future violations of section 89519. (See regulation 18361.10 regarding precedential decisionmaking in the context of enforcement administrative proceedings.) The Commission notes that this opinion has no precedential value in enforcement cases. This opinion also does not absolve any candidate, elected officer, or treasurer of liability under the Act. Therefore, this opinion has no effect on the analysis to be undertaken pursuant to regulation 18361.5(d).

The Commission also notes that the Act makes clear that liability for a violation of the Act exists even in the instance of treasurer error, admitted or otherwise. Section 91006 states that if one or more persons are responsible for a violation of the Act, they shall be jointly and severally liable. Therefore, this opinion has no effect on the joint and several liability of a filer and a treasurer for applicable violations of the Act.

Finally, while requestors may, on a case-by-case basis, make requests of this Commission for purposes of addressing prospective conduct to determine their duties under the Act, this opinion is not an interpretation of the Act in general terms. (Regulation 18320.) Therefore, staff is instructed that requests for written or telephone advice regarding the application of section 89519 and regulation 18951, specifically, continue to reflect the Commission's longstanding advice by staff. Staff is further instructed that any person who seeks written advice pursuant to the provisions of section 83114(a), because the person believes extraordinary circumstances supported by sworn testimony similar to this factual scenario exist **[, and can also provide additional documentary evidence corroborating the material facts contained in their sworn testimony, should]** be instructed to make an opinion request of the Commission if the person seeks reconsideration of any staff advice rendered, and, only if deemed appropriate by its Executive Director, will the request be considered by the Commission.

Adopted by the Commission on April 24, 2006.

Concurring:_____

Dissenting: _____ Abstaining: _____

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Liane Randolph
Chairman