

September 17, 2013

VIA ELECTRONIC MAIL AND PERSONAL DELIVERY

Fair Political Practices Commission
Chair Ravel and Commissioners Casher, Eskovitz,
Wasserman, and Wynne
428 J Street, Suite 620
Sacramento, CA 95814

**RE: Public Comment regarding Item 29 -- In the Matter of Chuck Reed,
et al. (FPPC Case No. 12/761)**

Dear Chair Ravel and Commissioners:

I write on behalf my client, Jim Unland, who filed the original complaint against Mayor Chuck Reed in this enforcement matter. We urge the Commission to uphold its statutory duty to enforce Government Code section 85501, which clearly prohibited Mayor Reed from using his candidate-controlled committee to contribute to another committee making independent expenditures opposing a candidate for office.

The Commission has been asked to decide two legal questions: (1) Was Respondent Mayor Reed a “candidate” for purposes of the Political Reform Act at the time he made a \$100,000 contribution to the San Jose Reform Committee and (2) Was Respondent Mayor Reed prohibited by Section 85501 from making the contribution for the purpose of supporting the independent expenditure activities of another committee. The answer is clearly “yes” to both questions.

Section 85501 reads: “A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.” A “controlled committee” of a candidate is any committee “that is controlled directly or indirectly by a candidate . . . or that acts jointly with a candidate . . . in connection with the making of expenditures.” (Gov. Code §82016(a).) The Commission’s decision in this matter will depend on whether Mayor Reed was a *candidate* for purposes of the prohibition contained in Section 85501.

The plain language of the Political Reform Act and Commission regulations state that a person becomes a *candidate* when they seek nomination for or election to any elective office and retain their status as a candidate until they no longer have disclosure obligations under the Act. (Gov. Code §§82007, 84214.). Because a candidate has disclosure obligations under the Act as long as the individual holds office, a candidate remains a candidate until he or she leaves office. (2 CCR §18404(d).) In order to avoid any confusion about whether an officeholder is a candidate, the Commission adopted a regulation that expressly states that the term candidate “. . . includes an officeholder . . .”

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(*Id.* (Emphasis added).) These statutory and regulatory provisions leave no doubt that Mayor Reed was a candidate for purposes of the Act when he made the \$100,000 contribution to the San Jose Reform Committee. As such, he violated Section 85501 when he made the contribution.

Mayor Reed argues that Section 85501 is unconstitutional and should not, therefore, be enforced by the Commission. But the question of whether the statute is constitutional is not properly before the Commission in light of Art. III, sec. 3.5 of the California Constitution which provides that an administrative agency has no power “[t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.” None of the cases cited by Respondent – not Citizens United, not Long Beach Area Chamber of Commerce, and not Thalheimer – invalidated or otherwise address laws imposing restrictions on the ability of *candidates* to engage in independent expenditure activities. Respondent fails to cite any appellate court decision invalidating a statute that limits or restricts a candidate’s ability to engage in independent expenditure activities. Because no appellate court has determined Section 85501 to be unconstitutional, the Commission is required to enforce the statute until such time as an appellate court invalidates the provision.

A decision by the Commission not to enforce Section 85501 against Mayor Reed would have significant effects on the entire campaign finance system in California because it will effectively allow state and local candidates in California to engage in independent expenditures supporting or opposing other candidates. As recently as 2010, the Commission acknowledged the important role that Section 85501 has under the Political Reform Act: “Limits on the amount that persons may give to a candidate or that existing officeholders may contribute or transfer to another candidate would be rendered ineffective absent Section 85501, if a candidate-controlled committee could make an unlimited amount of independent expenditures to support or oppose another candidate.” (Fair Political Practices Commission, Pirayou Advice Letter, I-10-159, December 13, 2010, p. 4.) A decision with such far-reaching impacts on the campaign finance system is required to be decided by the courts or changed by a vote of the people; it should not be decided by the Commission under these circumstances.

We appreciate the opportunity to submit these comments.

Very truly yours,

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RRR/ea

cc: James R. Sutton and Jesse Mainardi, Counsel for Respondent Mayor Reed