

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

March 14, 1996

Lance H. Olson
Olson, Hagel, Fong, Leidigh,
Waters and Fishburn
Plaza Towers
555 Capitol Mall, Suite 1425
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-96-088

Dear Mr. Olson:

This is in response to your letter of March 1, 1996, requesting expedited advice regarding the responsibilities of Assemblyman Byron Sher under the provisions of the Political Reform Act (the "Act").¹

Please note that nothing in this letter should be construed to evaluate any conduct which may have already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

A candidate for state senate is running in a special election and primary election on the same day for the same seat. Under what circumstances may the candidate make expenditures prior to the election from the primary election campaign bank account for campaign communications?

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations, Sections 18000-18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSION

Because both the primary and the special election will occur on the same day, the candidate may reasonably apportion expenditures intended to benefit both campaigns between the two campaign bank accounts.

FACTS

Assemblymember Byron Sher is currently campaigning in a special election to fill the State Senate seat for the 11th district. The special election will be held on March 26, 1996. The Assemblymember has established a separate campaign bank account for the special election. The Assemblymember has several opponents for the special election.

Assemblymember Sher is also campaigning in the Democratic primary election to be held for the next term of the same Senate seat. This election will be held on the same day as the special election. The Assemblymember has no opponent in the primary election. Only registered Democrats will vote in this primary. The Assemblymember has established a separate campaign bank account for the primary election.

ANALYSIS

On September 25, 1990, a federal district court invalidated Proposition 73's limits on contributions in California primary and general elections. The Court also issued a permanent injunction barring the Commission from imposing limits in such elections. This ruling was upheld on appeal. (Service Employees International Union, AFL-CIO, CLC, et al. v. Fair Political Practices Commission (9th Cir. 1992) 955 F.2d 1312, cert.den. 505 U.S. 1230, 112 S.Ct. 3056 (1992).)

However, the court did not invalidate the special election and special runoff election contribution limits of Proposition 73.² Thus, in 1991, the Commission adopted Regulation 18535 to set forth rules regarding special election campaign accounts. Regulation 18535(e) provides in pertinent part:

"Any expenditure made by a candidate in a special election or special runoff election during the special election cycle or special runoff election cycle shall be made by the candidate's special election committee, unless it is clear from the surrounding circumstances that the expenditure is unrelated to the special or special runoff election."

The Commission Memorandum discussing the regulation described the basis for the presumption. (Commission Memorandum of May 24,

² The question of the severability of the special election limits has never been tested in court.

1991 Re: Pre-Notice Discussion of Regulation 18535 and Regulation 18535.1.)

"Initially, as enacted, Proposition 73 provided complementary provisions which limited circumvention of the contribution limitations of the Act. However, due to the SEIU decision, committees established for elections other than special elections are no longer subject to contribution limitations. Currently, many candidates maintain both special election committees and regular election committees simultaneously. Consequently, there is a danger of candidates using contributions raised in excess of the special election contribution limitations to benefit them in a special election. Permitting such expenditures without restriction would not only permit circumvention of the special election limitations of the Act, but would also greatly disadvantage candidates without other controlled committees.

Staff believes these rebuttable presumptions best balance the interest of the Commission in upholding the statutorily-imposed contribution limitations of special elections and the interest of the candidate in freely campaigning for other offices near the time of a special election." (Emphasis added.)

Thus, the rationale behind the presumption was that incumbents might be able to use existing officeholder accounts or future election accounts to circumvent the contribution limits for special elections. Your facts present a distinctly different situation than that initially contemplated.³ Under your facts, both the special and regular election for the same Senate seat (but for different terms) are occurring on the same date. Consequently, because the campaign period for the two elections would be identical, in many instances it will be extremely difficult, if not impossible, to distinguish between expenditures made for the primary and expenditures made for the special election cycle as contemplated by the regulation.

You asked about communications solely targeted at persons not of the candidate's party who could not vote in the primary but can

³ For example, in the McNamara Advice Letter, No. I-94-021, we advised regarding the application of these rules with respect to the special election held on April 12, 1994, and the regular state primary election held on June 7, 1994. However, we expressly reserved any comment on a situation where the two elections were held on the same day: "this letter does not consider the impact of a special runoff election You stated that if a special runoff election is necessary, it will be held on June 7, 1994. Should the special runoff election be necessary, you should contact the Commission for further advice." (Emphasis added.)

vote in the special election. You have not offered any facts to suggest that these expenditures are in fact for any election other than the special election. If this is true, all of the expenditures directly related to the specific communication should be made from the special election campaign bank account from funds subject to limits.

You also asked about generic communications directed at Democratic voters who could vote in both elections. Because the special election falls on the exact same date as the primary, this fact alone suggests that the expenditures are equally applicable to both elections. However, the facts could dictate that some other reasonable apportionment would be appropriate for a specific expenditure. In the Blanning Advice letter, No. A-94-113, the special election preceded the primary by one month. Under those circumstances, we said:

"[W]here a candidate is running in both a special election and a regular election for the same office, it is reasonable to assume that certain expenses . . . are attributable to both campaigns. Therefore, you may allocate these expenses using any reasonable method. The committees should maintain records which support the allocation." (Id. at p.2.)

That general rule would also apply here when the elections, one with contribution limits and one without, are held on the same day.

Finally, you asked about general public communications. Again, because the elections fall on the same day and involve the same district, these facts suggest that if the Assemblymember wishes to pay for advertisements to benefit both campaigns, he may do so and apportion the value. This would of course be the case assuming no other facts indicated that the communication was actually for one or the other election.

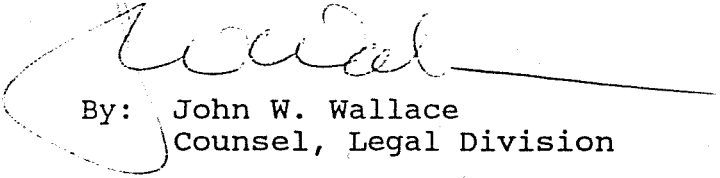
Please note that under this factual test, we cannot advise about every future expenditure that may be contemplated. Application of this rule will necessarily turn on the specific facts and circumstances surrounding each expenditure. And as with any factual analysis, there cannot be a definitive answer that applies to every factual situation.

Moreover, where the question is a close one factually, the safest course would be to make the expenditure from the special election account. You should also maintain thorough and accurate records which support any allocations you make.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: John W. Wallace
Counsel, Legal Division