

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

April 7, 1997

The Honorable Kevin Murray
Assembly Member, 47th District
Chair
California Legislative Black Caucus
State Capitol
Post Office Box 942849
Sacramento, California 94249-0001

**Re: Your Request for Advice
Our File No. A-97-142**

Dear Assembly Member Murray:

This letter is a response to your request for advice about the Political Reform Act (the "Act").¹

I. QUESTIONS

(1) If a third party pays for engraved commemorative medallions presented by the Legislative Black Caucus ("LBC") to former African American legislators, would a contribution or a gift be made to the LBC, or to you? If a contribution or gift would result, would there be a violation of the Act?

(2) If paid legislative staff time is devoted to projects jointly undertaken by the LBC with non-profit organizations, which organizations may undertake fundraising in support of LBC activities, is there a violation of the Act?

II. CONCLUSIONS

(1) Because you exercise significant influence over its actions and decisions, the LBC is probably considered to be your controlled committee. Expenditures by third parties made at your behest are contributions, unless an exception applies; no exception applies for the payment-at-

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

issue here. Since the payment for the medallions would be made in cooperation or coordination with the LBC, it would be made at LBC's behest, and would be a contribution to your controlled committee, the LBC. As you and your controlled committee(s) are currently precluded from fundraising by the "blackout" provisions of Proposition 208, a violation of the Act would probably result at this time. Also, depending upon the amount of the payment for the medallions, there may be a violation of the contribution amount limits of the Act.

(2) It is impossible to give a conclusive answer to this question without specific facts about the non-profit organizations, their nature of the joint projects, and the nature of the fundraising activities which may take place. For informational purposes, we have outlined some of the possible implications of such practices in part IV.B., below.

III. FACTS

On February 24, 1997, the Legislative Black Caucus (LBC) presented medallions to 29 African-American former members of the Legislature. The presentation took place on the floor of the Legislature. Only current members of the LBC and the honorees participated in the event.

The medallions themselves are engraved, but not personalized, with a value of less than \$50 each. The invoice for the medallions remains outstanding. A labor organization, the American Federation of State, County, and Municipal Employees (AFSCME) has offered to pay for the medallions. AFSCME is a lobbyist employer under the Act.

The LBC is considering the use of legislative staff time on projects undertaken in association with non-profit organizations.² The non-profit organizations may engage in fundraising to help support LBC activities, such as conferences, hearings, cultural events, etc.

IV. ANALYSIS

A. Question (1)

Proposition 208 added to the Act significant limitations on contributions to candidates and their controlled committees. Among these new restrictions are limits on *how much* may be contributed (see Sections 85301 et seq.), and *when* contributions may be made and accepted. (See Section 85305.)

A contribution is a payment for political purposes for which full and adequate consideration is not made. (Regulation 18215(a).) A payment is "for political purposes" if (1) it is for the purpose of influencing the actions of the voters for or against a candidate or measure *or* (2) it is received or made at the behest of (among others) a candidate or the candidate's

² Commission advice applies prospectively only, and should not be construed to apply to any actions already taken. (Regulation 18329(b)(8)(A).)

controlled committee. (Regulation 18215(a)(1), (2).)

Regulation 18225.7 elaborates on when a payment or expenditure is “made at the behest of” a candidate:

“(a) ‘Made at the behest of’ means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code Section 82031.

(b) An expenditure is presumed to be made at the behest of a candidate or committee if it is:

(1) Based on information about the candidate's or committee's campaign needs or plans provided to the expending person by the candidate, committee, or agents thereof; or

(2) Made by or through any agent of the candidate or committee in the course of their involvement in the current campaign.

(c) An expenditure is not made at the behest of a candidate or committee merely when:

(1) A person interviews a candidate on issues affecting the expending person, provided that prior to making a subsequent expenditure, that person has not communicated with the candidate or the candidate's agents concerning the expenditure; or

(2) The expending person has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents.”

Under the Act, any person³ who receives contributions totaling \$1,000 or more in a calendar year is a “committee.” (Section 82013(a).) Thus, if the LBC receives contributions--which includes payments made at the behest of one of its members--of \$1,000 or more in a calendar year, it is a committee, within the meaning of the Act.

A committee is considered to be “controlled” by a candidate⁴ if he or she (or his or her

³ The Act’s definition of “person” is quite broad:

“‘Person’ means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert.” (Section 82047.)

The LBC, a “group of persons acting in concert,” is a person under the Act.

⁴ You are a “candidate,” within the meaning of the Act. (Section 82007; *Gallegos Advice Letter*, No. A-96-267.)

agent) "has a significant influence on the actions or decisions of the committee." (Section 82016.) Presumably, as the chair, you exercise "significant influence on the actions or decisions" of the LBC. Thus, if the LBC in fact qualifies as a committee (see preceding paragraph), it is "controlled" by you.⁵ Payments by AFSCME for the medallions would be considered contributions because they would be made in coordination or cooperation--in other words, at the behest of--you, your agents (i.e., your staffers), or the LBC. (None of the statutory or regulatory exceptions to the definition of contribution apply.)

Section 85305, added by Proposition 208, imposes what is colloquially known as a blackout period in which contributions may not be accepted by a candidate or his or her controlled committee. In districts of fewer than 1,000,000 residents, contributions may not be accepted more than six months before any primary (or special primary) or if there is no primary, before the general or special election. (Section 85303(a).) In districts of 1,000,000 or more residents, the black-out period extends for twelve months before any primary (or special primary) or if there is no primary, before the general or special election. (Section 85305(b).) Whether your district has fewer than or more than 1,000,000 residents, you are currently in your blackout period before the next Assembly primary, and may not accept contributions. If AFSCME makes an expenditure at your behest through the LBC, you and the LBC, which is probably your controlled committee, will have violated Section 85305 by accepting a contribution during the blackout period.

If AFSCME (or any other person) makes an expenditure at your behest through the LBC to pay for the medallions, there may also be a violation of the contribution amount limits. The contribution limits applicable to you are either \$500, if you have not accepted voluntary spending limits, or \$1,000 if you have accepted such limits. (Sections 85301(c), Section 85402(c).)⁶ We understand that 29 medallions were presented to former members. Assuming a value of approximately \$50 per medallion, the total amount of the expenditure necessary for the medallions well exceeds \$1,000, which is the highest possible contribution limit.

The payment by a third party for the medallions would not constitute a gift to the LBC or to you because the definition of gift excludes campaign contributions. (Section 82028(b)(4).) As explained in the preceding paragraphs, the payment for the medallion would probably be considered to be a contribution because it would be made at the behest of you or your controlled committee.

Note that you may be able to use your officeholder account for these activities. Proposition 208 added Section 85313, which permits such a "segregated officeholder expense

⁵ We have previously advised that a legislative caucus is a "controlled committee," within the meaning of the Act, of the caucus chair. (*Bergeson Advice Letter*, No. I-92-093; copy attached.)

⁶ Note that different limits apply to contributions from small contributor committee and political party committees. (See Sections 85302, 85304.)

fund for expenses related to ... carrying out the official duties of the elected officer....” (Section 85313(a).) Serving as the chair of the LBC is related to carrying out your official duties as a Member of the Assembly. Section 85313(b) provides that contributions to an officeholder account are not considered to be campaign contributions. However, note that no person may contribute more than \$250 per year to an officeholder account. (*Ibid.*) Thus, AFSCME may make contributions of up to \$250 per year to your officeholder account to defray partially the cost of the medallions paid from the officeholder account.

We appreciate that the advice in this letter may present significant practical problems for you and the members of the LBC, given your understanding of the nature of the Caucus. However, we are constrained by the plain language of the Act, the regulations, and well-settled, long-relied-upon interpretation. Given the unique nature of legislative caucuses, there appears to be justification for a regulatory proposal specifically addressing the structure and operation of caucuses. Such a new regulation would aim to allow caucuses sufficient flexibility to carry out their unique agendas, while simultaneously maintaining the integrity of the Act, including Prop. 208. The Commission’s staff looks forward to discussing such a proposal with you.

B. Question (2).

The following analysis addresses only the potential implications under the Act of using paid legislative staff time for LBC joint projects with non-profits who may engage in fundraising to support LBC activities. Please note that this practice may raise serious issues under other laws which are outside the jurisdiction and expertise of the Commission. (See, e.g., Penal Code § 424.)

Because you have provided only general information, we are unable to provide more than an overview of the potential implications of using legislative staff time for the joint projects with non-profits. Consequently, the following must be informal advice, which does not confer immunity under Section 83114. (Regulation 18329(c).) If you wish to write for further advice about a particular situation (i.e., a particular, identified non-profit, and specific activities), we will be able to assist you further.

1. Payments to the LBC from the non-profits may be contributions to you.

You have stated that the non-profits with whom the LBC may undertake joint projects may conduct fundraising to support LBC activities. If the funds raised by the non-profits are transferred to the LBC, they would probably constitute contributions to you. As explained above (part IV.A.), the LBC is considered to be a controlled committee of its chair, you. Since the joint projects undertaken by the LBC and the non-profits are by virtue of their “jointness” coordinated, the payments to the LBC from the fundraising non-profits would be at your behest (Regulation 18225.7), and, therefore, would be contributions (Regulation 18215(a)(2)).

Also, under the Act, contributions include more than just monetary payments. If the non-profit organizations provide non-monetary payments (e.g., use of copiers or phones, or the use of

secretarial workers) to LBC, these, too, would be contributions to the extent the LBC does not fully reimburse the non-profits.⁷

Depending upon the amount and the timing of the contributions, there could be a violation of the black-out rules (Section 85305) and of the contribution amount limits (Section 85301). Also, if the amount of the contributions from the non-profits exceeds \$100, the new independent expenditure restrictions added by Proposition 208 are triggered. Section 85500(c) provides that any contributor (such as the non-profits in the scenario we are analyzing) of \$100 or more to a candidate is considered to be acting in concert with the candidate and may not make independent expenditures and contributions which, when combined, exceed the applicable contribution amount limit.

2. Payments to the non-profits from third parties may be contributions to you if the non-profits are "controlled" by you.

Depending upon the degree of influence you (or your agents) exert in the affairs of the non-profits, the non-profits themselves *may* be considered to be controlled by you. (See Section 82016; Regulation 18217; and the *Escutia* Advice Letter, No. A-96-113, copy attached.) If the non-profits are controlled, within the meaning of the Act, by you, payments by third parties to the non-profits may be considered to contributions to you. (*Escutia* Advice Letter, No. A-96-113.) Whether a given non-profit organization is controlled by you depends upon the facts of the situation, and must be addressed on a case-by-case basis.

3. Expenditures by the non-profits on events undertaken jointly with the LBC may constitute contributions to you and the LBC.

Expenditures made at the behest of a candidate are generally considered to be contributions to the candidate. (Section 82015; Regulation 18215(a)(2).) You have described the projects to be undertaken with the non-profits as "joint." This description seems to create a significant likelihood that expenditures by the non-profits on events undertaken with the LBC will be coordinated with the LBC, which is considered to be controlled by you. Regulation 18225.7 defines payments and expenditures to be at the behest of a candidate when the payments and expenditures are made "at the direction of, in cooperation, consultation, coordination, concert with, at the request or suggestion of, or with the express, prior consent of" the candidate or his or her controlled committees. Therefore, expenditures made by a non-profit on an event "co-sponsored" with the LBC may be contributions to you. Co-sponsored events are a complex, highly fact-dependent issue; it is impossible to respond more completely without facts describing a particular event, a particular non-profit, and particular expenditures. (For background on co-

⁷ The Act defines "contribution" in terms of "payments." (Section 82015.) Payment is in turn defined to mean "payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible." (Section 82044.) Thus, "in-kind" payments (such as use of office equipment or staff) are considered to be contributions, unless an exception applies.

sponsored events, see the *Schmidt* Advice Letter, No. A-96-056, and the *Gallegos* Advice Letter, No. A-96-267, copies attached.)

4. The value of the legislative staff time devoted to the joint projects undertaken with the non-profits may be a contribution from the State to you.

The value of the salary and expenses of the staffers assigned to the joint projects undertaken by the LBC with the non-profits may constitute a contribution by the State to you. Regulation 18420(b) provides that the "payment by a state ... agency of the salary or expenses of its employees ... is an expenditure or contribution only if the salary or expenses are for campaign activities and meet the requirements of [Regulation] 18423." That provision continues with a non-exhaustive list of activities which constitute "campaign activities" for purposes of the provision. Note in particular subdivision (b)(3): "Soliciting, receiving, or acknowledging campaign contributions or arranging for the raising of contributions." (Regulation 18420(b)(3).) We advised above (Parts IV.B.1-IV.B.3) that contributions to you through your controlled committee, the LBC, could result from the joint projects undertaken with the non-profits. The participation of legislative staffers in these activities could be characterized as "arranging for the raising of contributions," and therefore constitute "campaign activities" under Regulation 18420(b)(3).

The second condition stated in Regulation 18420(b) is that the staffer(s)'s activities satisfy the requirements of Regulation 18423. Subdivision (a) of that regulation provides,

"The payment of salary, reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10% of his compensated time in any one month rendering services for political purposes is a contribution, as defined in Government Code Section 82015 and 2 Cal. Adm. Code Section 18215, or an expenditure, as defined in Government Code Section 82025 and 2 Cal. Adm. Code Section 18225, by the employer if:

- (1) The employee renders services at the request or direction of the employer; or
- (2) The employee, with consent of the employer, is relieved of any normal working responsibilities related to his employment in order to render the personal services, unless the employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity." (Regulation 18423(a).)

Subdivision (b) of Regulation 18423 elaborates on the term "rendered for political purposes," as used in the regulation:

"(b) Personal services are rendered for political purposes if they are carried on for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of one or more candidates, or the qualification or passage of any measure, and include but are not limited to:

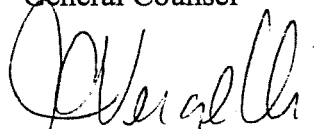
- (1) Personal services received by or made at the behest of a candidate or committee by an employee; and
- (2) Hours spent developing or distributing communications that expressly advocate the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure.” (Regulation 18423(b).)

It is impossible to respond further on this issue absent more facts. We merely bring it to your attention, and invite you to seek further advice when further facts become available.

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

Sincerely,

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