



FAIR POLITICAL PRACTICES COMMISSION

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July 28, 2010

Lance Olson
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555 Capitol Mall, Suite 1425
Sacramento, CA 95814-4602

**RE: Your Request for Advice
Our File No. A-10-117**

Dear Mr. Olson:

This letter is in response to your request for advice on behalf of Secretary of State Debra Bowen and her campaign committee Debra Bowen for Secretary of State 2010 (FPPC ID #1293623) regarding the campaign provisions of the Political Reform Act (the "Act").¹

QUESTION

May the Debra Bowen for Secretary of State 2010 committee attribute as a contribution to the committee for the primary election a check that was designated for the primary election and mailed to the committee prior to the primary election but, by error of the post office, delivered to the committee after the primary election?

CONCLUSION

Under the unique facts presented, the committee may attribute the check as a contribution to the primary election.

FACTS

Debra Bowen for Secretary of State 2010 (Bowen 2010) is the state candidate campaign committee of Secretary of State Debra Bowen. Her campaign committee office is located in the offices of her campaign consultant in Pasadena. The office is located on the 5th floor of a

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

building that contains the Pasadena Playhouse. The Playhouse has closed, but the office building remains open. The consultant has been the only tenant for some time and is in Suite 504.

Mailboxes for the suites in the office building are located on the first floor of the building. Certified mail is supposed to be brought upstairs and be delivered to the suites by the local postal carrier.

Prior to the primary election, a contributor mailed a check via certified mail to Bowen 2010 at the Pasadena address, including the suite number. This check was designated for the primary election. The check was dated May 17, 2010 and was postmarked May 18, 2010.

The Post Office attempted to deliver the certified envelope on two separate occasions. The first attempt occurred on May 21 at 10 a.m. The second attempt happened on June 1. On both occasions the postal carrier, instead of coming into Suite 504 which was occupied during normal business hours, placed a "Sorry We Missed You" delivery notice under the door of an office suite adjacent to Suite 504 on the fifth floor. The adjacent suite was vacant, the door was locked and there was no suite number on the door. The delivery notice indicated there was an attempt to deliver a certified envelope addressed to Bowen 2010 for Suite 504. The article number on each notice matches the number provided to the contributor on the certified mail envelope used to send the contribution.

Because the two delivery notices remained in a vacant office next to the Consultant's office the contribution check went undelivered until after the election.

Eventually the Post Office designated the envelope containing the check "return to sender" on June 13, 2010. The returned check was received by the contributor on June 16, 2010. The contributor immediately called the Bowen 2010 staff about the check and asked if the check could be re-sent to the committee and treated as a contribution for the primary election.

At about the same time the check was returned to the contributor, the Landlord decided to move his own office into the office building. He opened the vacant suite next to 504 and discovered the two notices from the Post Office on the floor. The landlord immediately delivered the notices to Suite 504.

Bowen 2010 would have received the check prior to the primary election but for the mistake of the post office. This is similar to the situation in the *Fishburn* Advice Letter No. A-06-143, where the O'Connell 2006 committee was permitted to keep several checks that it would have received prior to the primary but for post office error. Bowen 2010 has no net debt remaining from the primary election.

ANALYSIS

With limited exceptions,² Section 85316 restricts a candidate for state elective office,

² Section 85316(b) permits fundraising for officeholder purposes after an election.

such as Ms. Bowen, from accepting a contribution after the date of an election.

“A contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.”

Regulation 18421.1(c) provides:

“A monetary contribution is ‘received’ on the date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the check or other negotiable instrument by which the contribution is made. All contributions received by a person acting as an agent of a candidate or committee shall be reported to and disclosed by the candidate or committee, or by the committee's treasurer, no later than the closing date of the next campaign statement that the committee or candidate is required to file.” (Emphasis added.)

Based on these provisions, you are essentially asking whether a check designated for the primary election and mailed to the committee in ample time for the committee to receive the check before that election, but, due to post office error, was not in the committee's physical possession until after the date of the primary election was, under the facts presented, essentially “received” by the committee for the primary.

In *Fishburn*, we considered a similar question. There, several checks designated for and mailed to a committee in ample time before the primary election were designated by the post office as “overflow” mail for the committee's post office box and therefore not placed in the box. Not until after the primary election was the committee given notice of the existence of the “overflow” mail. Our analysis focused on whether, under the circumstances, the committee had “constructive possession” of the checks, and thus had “received” them at the time they arrived at the post office for placement in the committee's regular post office box. Noting that neither the Act nor Commission regulations defined the term “constructive possession,” we looked to the definition of that term as used in the Civil Code when determining whether a mailed contract is “received” and therefore avoids violation of the statute of frauds. Specifically, Civil Code Section 1624(b)(3)(B) provides that constructive receipt of the mailed contract occurs at the time actual receipt by the receiving party would have occurred if the receiving party, as an organization, had exercised reasonable diligence.

Applying this test to the unique facts presented here, we think Ms. Bowen's committee had “constructive possession” of, and therefore, “received” the contribution for purposes of Regulation 18421.1(c) on the date the post office first attempted delivery of the contribution at the office next door to the committee. The check was designated by the contributor as a contribution for the primary election and sent by certified mail in ample time for the committee to receive it for that election. Also, the committee occupied the office suite to which the

contribution was sent and the suite was open during normal business hours. The only problem was that the postal carrier delivering the contribution mistakenly went to the vacant office next door, but even then left notification that an attempted delivery had been made. Since the next door office was vacant, the committee did not learn of the attempted delivery or receive the check until well after the date of the primary election. These facts indicate that the committee acted diligently in all respects in regards to making itself available to receive the contribution and in actually retrieving it. Furthermore, the contribution was delivered to the same building occupied by the committee and to the suite next door to the committee's office, meaning that the contribution was figuratively on the doorstep of the committee but did not make it through the door only because of the postal carrier's failure to note the committee's office next door. On this basis, we find that the check was "received" by the committee for the primary election and may be attributed to the primary election by the committee.

Finally, please note that our conclusion is based on the unique facts presented. Also, we strongly advise the committee to retain for its records all documentation supporting the facts presented to us, such as proof that the check was specifically designated for the primary election, that the check was mailed in ample time before the election for use in the election, and that the post office attempted to deliver the check to the committee prior to the election.

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

Sincerely,



Scott Hallabrin
General Counsel

SH:jgl