



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 20, 2018

Cassandra M. Ferrannini
Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-18-009

Dear Ms. Ferrannini:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹

Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

FACTS AS PROVIDED BY REQUESTOR

Your firm represents Senator Tony Mendoza. Former staff members of Senator Mendoza have accused the Senator of sexual harassment. Senator Mendoza denies these allegations and all wrongdoing. Specifically, it has been alleged that a former Senate fellow, Senate intern, and Senate employee felt uncomfortable based upon interactions they had with the Senator while working for him. According to your facts there have been no allegations of inappropriate physical contact between the Senator, any of his staff, or anyone else at any time.

Around December 2017, a former employee of the Senate filed a complaint with the Department of Fair Employment and Housing ("DFEH"). In her complaint, the former employee alleges she was terminated after reporting allegations that the Senator had made a Senate fellow feel uncomfortable. The DFEH did not investigate this complaint but issued a Right to Sue letter to the Senate's former employee. This former employee has now presented a claim for damages to the Senate, a pre-requisite to filing a civil action.

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.

Based upon the allegations against Senator Mendoza, several senators have called for his resignation, suspension, or expulsion from the Senate. On January 3, 2018, Senate Resolution 69 was formally introduced to expel Senator Mendoza from the Senate.

The Senate is also conducting a formal investigation regarding the allegations against Senator Mendoza and has retained two law firms to conduct this investigation.

ANALYSIS

In general, the Act's provisions restricting the "personal use" of campaign funds are designed to prevent candidates, elected officials, and others who control the expenditures of campaign funds from benefiting privately from their campaign activities. Section 89510 provides that "[a]ll contributions deposited into the campaign account shall be deemed to be held in trust for expenses associated with the election of the candidate or for expenses associated with holding office." The general rule is that an expenditure of campaign funds must be reasonably related to a political, legislative or governmental purpose. However, where an expenditure of campaign funds confers a substantial personal benefit on any individual or individuals with authority to approve the expenditure of campaign funds held by the committee or is for professional services, in order to be within the lawful execution of the trust imposed by Section 89510 the expenditure must be *directly* related to a political, legislative, or governmental purpose. (Sections 89512 and 89513(b)(1).)²

The payment of a candidate's attorney's fees would confer a substantial personal benefit on a candidate. Accordingly, the payment of attorney's fees with campaign funds is permitted only if the expenditure is directly related to a political, legislative, or government purpose. As to using campaign funds for attorney's fees, Section 89514 states:

"Expenditures of campaign funds for attorney's fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative, or governmental purpose except where the litigation is directly related to activities of a committee that are consistent with its primary objectives or arises directly out of a committee's activities or 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 to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action arising from an election contest or recount."

In the case of legal defense funds, Section 85304 provides

"A candidate for elective state office or an elected state officer may establish a separate account to defray attorney's fees and other related legal costs incurred for the candidate's or officer's legal defense if the candidate or officer is subject to

² Section 89511(b)(3) defines "substantial personal benefit" as an expenditure of campaign funds which results in a direct personal benefit with a value of more than \$200 to a candidate, elected officer, or any individual or individuals with authority to approve the expenditure of campaign funds held by a committee.

one or more civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties. These funds may be used only to defray those attorney fees and other related legal costs."

The Former Employee's Claim Related to Wrongful Termination

You have stated that a former employee of Senator Mendoza filed a claim with DFEH and received a right to sue letter based on the fact she believed she was wrongfully terminated because she reported allegations that Senator Mendoza made a Senate Fellow feel uncomfortable. This former employee has now presented a claim for damages to the Senate, which is a prerequisite to filing a civil action.

Based upon the limited facts you have provided the conduct complained of was in connection with Senator Mendoza's duties related to managing his staff member and firing of said staff member while Senator Mendoza has been in office. You have not provided any facts indicating this former employee's complaint involves sexual harassment directed at her during her employment or at any other time. Assuming this is an accurate description, the proceedings you have described arise directly out of Senator Mendoza's activities, duties, or status as a candidate or elected, officer, and Senator Mendoza may use campaign funds to defend himself in the claim for damages before the Senate and in a subsequent civil action should one be filed in this matter. Additionally, with regard to legal defense funds, based upon the facts you have provided, this former employee's claim arose directly out of the performance of Senator Mendoza's governmental activities and duties. Therefore, Senator Mendoza may establish a legal defense fund to defray attorney's fees in connection with this proceeding and a subsequent civil proceeding should one be filed as limited by Regulation 18530.4.³

The Senate's Action to Expel Senator Mendoza Based on Violations of Senate Rules or Policies

You have provided that Senate Resolution 69 was formally introduced to expel Senator Mendoza from the Senate. Based upon the very limited facts you have provided you assert this proceeding is based upon conduct complained of that was in connection with work-related activities and duties while Senator Mendoza has been in office. Also, based upon your facts there are no claims of inappropriate physical contact from anyone in relation to this proceeding. Assuming this is an accurate description, the proceeding you have described would arise directly out of Senator Mendoza's activities, duties, or status as a candidate or elected, officer, and Senator Mendoza may use campaign funds to defend himself in this expulsion proceeding. Additionally, based upon the facts you have provided this proceeding arose directly out of the performance of Senator Mendoza's governmental activities and duties and Senator Mendoza may establish a legal defense fund to defray attorney's fees in connection with this proceeding as limited by Regulation

³ Amongst other requirements, Regulation 18530.4 permits an official to raise legal defense funds only in an amount reasonably calculated to pay for attorney fees and other related legal costs. Legal defense funds may only be raised for purposes of a proceeding by a government agency only when the officer reasonably concludes the agency has commenced an investigation or the agency formally commences an investigation. Legal defense funds for a civil proceeding may be raised only after the civil action has been filed.

18530.4. However, we caution that if the conduct complained of in these proceedings did not arise directly out of Senator Mendoza's official activities and duties as a Senator, such as at a social or private gathering that was unrelated to Senator Mendoza's governmental activities and duties, Senator Mendoza would likely be prohibited from using campaign and legal defense funds for these proceedings and should seek further advice.

Other Claims of Sexual Harassment by Employees and Senate Investigation

It is unclear from your facts exactly what activity the Senate investigation involves. You have provided that former staff members of Senator Mendoza have accused him of sexual harassment. For claims that arise directly out of Senator Mendoza's activities, duties, or status as a candidate or elected, officer, and Senator Mendoza may use campaign funds to defend himself. Senator Mendoza may establish a legal defense fund to defray attorney's fees in connection with proceedings as limited by Regulation 18530.4 that arise directly out of the performance of governmental activities and duties. Again, we caution that if the conduct complained of in these proceedings did not arise directly out of Senator Mendoza's official activities and duties as a Senator, such as at a social or private gathering that was unrelated to Senator Mendoza's governmental activities and duties, Senator Mendoza would likely be prohibited from using campaign and legal defense funds for these proceedings and should seek further advice.

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

Sincerely,

Brian G. Lau
Assistant General Counsel



Sukhi K. Brar
By: Senior Counsel, Legal Division

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