

AGENDA DOCUMENT NO. 12-05



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 1-19-12

SUBMITTED LATE

January 13, 2012

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Esther Heiden *EH*
Attorney

Subject: Drafts A and B of AO 2011-27 (New Mexico Voices for Children)

2012 JAN 13 PM 4: 01

FEDERAL ELECTION
COMMISSION
SECRETARIAT

Attached are two alternative drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for January 19, 2012.

Attachment

1 ADVISORY OPINION 2011-27

2
3 Sara Berger, Esq.
4 Freedman Boyd Hollander Goldberg Ives & Duncan P.A.
5 20 First Plaza, Suite 700
6 Albuquerque, NM 87102

DRAFT A

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9 Dear Ms. Berger:

10 We are responding to your advisory opinion request on behalf of New Mexico
11 Voices for Children (“NM Voices”), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to NM
13 Voices’ proposed severance payment to its former Executive Director who is currently a
14 candidate for the U.S. House of Representatives.

15 The Commission concludes that NM Voices’ proposed severance payment to its
16 former Executive Director will not result in a contribution under the Act or Commission
17 regulations.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 December 6, 2011.

21 NM Voices is a non-profit corporation under section 501(c)(3) of the Internal
22 Revenue Code.¹ Established in 1987 “to create systems-level sustainable change to
23 improve the lives of New Mexico’s children,” it currently has thirteen employees.

24 Eric Griego served for four years as NM Voices’ Executive Director at an annual
25 salary of \$96,400. He did not have a written employment contract. Mr. Griego left NM

¹ Section 501(c)(3) of the Internal Revenue Code exempts from taxation corporations organized and operated exclusively for religious, charitable, or educational purposes (among others) that do not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” 26 U.S.C. 501(c)(3).

1 Voices on October 17, 2011, and is currently a candidate for the U.S. House of
2 Representatives.

3 The requestor states that Mr. Griego wished to continue his employment with NM
4 Voices while he campaigned, either by taking a leave of absence or by reducing his work
5 schedule. NM Voices' Board of Directors ("the Board"), however, believed that it was in
6 NM Voices' best interest if Mr. Griego resigned. Given its 501(c)(3) status, NM Voices
7 wanted to avoid any appearance that it could influence Mr. Griego's "campaign
8 messaging or platform." Mr. Griego "agreed to resign prematurely to protect" NM
9 Voices' interests. "Consistent with its prior practices," the Board voted to approve a
10 severance payment to Mr. Griego amounting to three months of his salary – contingent
11 upon the Commission's determination that the payment will not result in a contribution
12 from NM Voices to Mr. Griego's campaign.

13 NM Voices maintains a "written policy manual for its employees regarding their
14 employment," but "the manual does not address severance packages." The Board has
15 discretion to decide whether a departing employee will receive a severance package.
16 Before 2007, NM Voices had occasionally provided severance payments to departing
17 employees, but not as a regular practice. Starting when Mr. Griego joined NM Voices as
18 an Executive Director in 2007, NM Voices instituted an unwritten policy of providing
19 severance to departing employees in certain circumstances.

20 Under this unwritten policy, NM Voices provided severance packages to
21 employees who were asked to leave the organization involuntarily because the separation
22 was deemed to be in NM Voices' best interest. For example, departing employees
23 received severance payments when their employment was terminated due to a

1 reorganization or other factors deemed to be outside the employee's control. If, however,
2 employees departed voluntarily, or if their employment was terminated for cause, they
3 did not receive severance. Nor did employees receive severance packages when their
4 positions were terminated because of lost grant funding; NM Voices considers such
5 circumstances to be beyond its control. In determining the amount of the severance
6 package, NM Voices historically took into account the departing employee's length of
7 service, past performance, and the expected length of time the employee would need to
8 find comparable employment.

9 Since 2007, twenty-seven employees have left NM Voices: seventeen resigned
10 voluntarily; two were fired for cause; three were terminated when their positions were
11 eliminated because of lost grant funding; one junior employee left in 2007 but NM
12 Voices' records do not indicate why; and four were asked to leave because their positions
13 were eliminated following a reorganization. Only the four employees terminated as a
14 result of reorganizations received severance packages. Three of these four employees
15 were senior managers, and each of them received severance payments equal to three
16 months of pay. The fourth, a junior staff member, received two weeks of salary.

17

1 ***Question Presented***

2 *May NM Voices make a severance payment to its former Executive Director equal*
3 *to three months of his salary without violating the Act's prohibition on contributions by*
4 *corporations to candidates?*

5 ***Legal Analysis and Conclusions***

6
7 Yes, NM Voices may make a severance payment to its former Executive Director
8 equal to three months of his salary without violating the Act's prohibition on
9 contributions by corporations to candidates, because the severance payment would be
10 made irrespective of his candidacy for Congress.

11 Corporations, including non-profits, are prohibited from making contributions to
12 Federal candidates or their authorized committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a)
13 and (b)(1). Under 2 U.S.C. 441b, the term "contribution" includes "any gift, loan,
14 advance, or deposit of money or anything of value made by any person for the purpose of
15 influencing any election for Federal office," and "any direct or indirect payment,
16 distribution, loan, advance, deposit, or gift of money, or any services, or anything of
17 value . . . to any candidate, campaign committee, or political party or organization," in
18 connection with any election to any Federal office. 2 U.S.C. 441b(b)(2); 11 CFR
19 114.2(b)(1).

20 Under Commission regulations implementing the Act's prohibition on the
21 "personal use" of campaign funds, 2 U.S.C. 439a, a third party's payment of a
22 candidate's expenses that would otherwise be deemed a "personal use" under 2 U.S.C.
23 439a(b)(2) is considered a contribution by the third party unless the payment would have
24 been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). The Commission's

1 regulations provide that certain types of employment-related compensation are
2 considered to be payments made “irrespective of the candidacy.” Payments that are
3 compensation shall be considered contributions unless –

4 (A) The compensation results from *bona fide* employment that is
5 genuinely independent of the candidacy;

6 (B) The compensation is exclusively in consideration of services
7 provided by the employee as part of this employment; and

8 (C) The compensation does not exceed the amount of
9 compensation which would be paid to any other similarly
10 qualified person for the same work over the same period of
11 time.

12 11 CFR 113.1(g)(6)(iii).

13 Here, the proposed severance payment will be made “irrespective of the
14 candidacy” and will not constitute a contribution. NM Voices’ proposed severance
15 payment is based on Mr. Griego’s past “*bona fide* employment,” would be made
16 “exclusively in consideration of” his past employment, and would be in line with
17 severance packages provided by NM Voices to “similarly qualified employees for the
18 same work over the same period of time.”

19 Further, the facts presented here are very similar to the facts considered by the
20 Commission in a prior advisory opinion, Advisory Opinion 2004-08 (American Sugar
21 Cane League), in which the Commission determined that a non-profit corporation’s
22 proposed severance payment to a congressional candidate who resigned to seek Federal
23 office was not a prohibited contribution. The Commission determined that the proposed
24 severance payment would be made irrespective of the candidacy where the former
25 employer had a regular, although unwritten, practice of providing severance packages to
26 its departing employees; the employer used objective factors in determining which

1 departing employees received severance pay; and the severance package was comparable
2 to past severance packages offered by the employer. *See id.*

3 NM Voices has a regular, although unwritten, practice of providing severance
4 packages to departing employees who were asked to leave because it was in the best
5 interest of the organization.² NM Voices' severance payment to Mr. Griego would be
6 consistent with the organization's past practice; he was asked to leave NM Voices
7 because of concerns about the effect of his candidacy on NM Voices' tax-exempt status
8 under section 501(c)(3) of the Internal Revenue Code. Thus, because the severance
9 payment to Mr. Griego would result from his *bona fide* employment with NM Voices that
10 is genuinely independent of his candidacy and the payment would be made exclusively in
11 consideration of services provided by Mr. Griego as part of his employment, the first two
12 criteria of 11 CFR 113.1(g)(6)(iii) are satisfied. 11 CFR 113.1(g)(6)(iii)(A) and (B).

13 Moreover, Mr. Griego's severance package is comparable to prior severance
14 packages provided by NM Voices to its departing employees. Mr. Griego, as a former
15 Executive Director, would receive the same three-month severance package that all other
16 departing senior managers have received from NM Voices for the past several years. The
17 severance provided to Mr. Griego would therefore "not exceed the amount of
18 compensation which would be paid to any other similarly qualified person for the same
19 work over the same period of time." 11 CFR 113.1(g)(6)(iii)(C).

20 In sum, because the severance payment would be made exclusively in
21 consideration of services provided by Mr. Griego as part of his *bona fide* employment

² The Commission concluded in Advisory Opinion 2004-08 (American Sugar Cane League) that "the lack of a written severance policy . . . [is] not fatal to the conclusion that the proposed severance package is compensation 'irrespective of the candidacy'" given the nature of small organizations. American Sugar Cane League employed five individuals; NM Voices is of comparable size, with only thirteen employees.

1 and would be comparable to compensation provided to similarly qualified former
2 employees, the proposed severance meets the requirements of 11 CFR 113.1(g)(6)(iii).
3 Accordingly, the Commission concludes that NM Voices' proposed severance payment
4 to Mr. Griego would not be a contribution under the Act and the Commission regulations.

5 This response constitutes an advisory opinion concerning the application of the
6 Act and Commission regulations to the specific transaction or activity set forth in your
7 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
8 of the facts or assumptions presented, and such facts or assumptions are material to a
9 conclusion presented in this advisory opinion, then the requestors may not rely on that
10 conclusion as support for its proposed activity. Any person involved in any specific
11 transaction or activity which is indistinguishable in all its material aspects from the
12 transaction or activity with respect to which this advisory opinion is rendered may rely on
13 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
14 conclusions in this advisory opinion may be affected by subsequent developments in the
15 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
16 The cited advisory opinion is available on the Commission's Web site at, www.fec.gov,
17 or directly from the Commission's Advisory Opinion searchable database at
18 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair

1 ADVISORY OPINION 2011-27

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DRAFT B

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17 employees, but not as a regular practice. Starting when Mr. Griego joined NM Voices as
18 an Executive Director in 2007, NM Voices instituted an unwritten policy of providing
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20 Under this unwritten policy, NM Voices provided severance packages to
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1 reorganization or other factors deemed to be outside the employee's control. If, however,
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3 did not receive severance. Nor did employees receive severance packages when their
4 positions were terminated because of lost grant funding; NM Voices considers such
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6 package, NM Voices historically took into account the departing employee's length of
7 service, past performance, and the expected length of time the employee would need to
8 find comparable employment.

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2 *May NM Voices make a severance payment to its former Executive Director equal*
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5 ***Legal Analysis and Conclusions***

6
7 No, NM Voices may not make a severance payment to its former Executive
8 Director equal to three months of his salary without violating the Act's prohibition on
9 contributions by corporations to candidates, because the Commission cannot conclude
10 that the severance payment would be made irrespective of his candidacy for Congress.

11 Corporations, including non-profits, are prohibited from making contributions to
12 Federal candidates or their authorized committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a)
13 and (b)(1). Under 2 U.S.C. 441b, the term "contribution" includes "any gift, loan,
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8 provided by the employee as part of this employment; and

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10 (C) The compensation does not exceed the amount of
11 compensation which would be paid to any other similarly
12 qualified person for the same work over the same period of
13 time.

14
15 11 CFR 113.1(g)(6)(iii).

16 In determining whether a candidate’s compensation, including severance, meets
17 the criteria of 11 CFR 113.1(g)(6)(iii), the Commission considers whether the
18 compensation was provided according to the organization’s existing policy or practice.
19 Advisory Opinion 2006-13 (Spivack) (compensation is not a contribution because it was
20 in accordance with the organization’s twenty-year-old compensation plan); Advisory
21 Opinion 2004-08 (American Sugar Cane League) (severance payment not a contribution
22 because the payment was provided according to organization’s seventeen-year-old
23 practice); Advisory Opinion 2000-1 (Tavares) (discretionary paid leave not reflecting
24 vacation or other earned leave time was a contribution); *see also* Matter Under Review
25 6023 (*The Loeffler Group, LLP, et al.*), Factual and Legal Analysis (finding no reason to
26 believe the Act was violated where a severance payment to a former employee working
27 for a candidate was consistent with the organization’s “pre-existing severance policy and
28 practices”).

1 NM Voices states that it has an unwritten policy of providing severance payments
2 to employees whose positions were terminated because it was in the best interest of the
3 organization. Of the twenty-seven employees who left NM Voices between 2007 and
4 2010, however, only four employees received severance, and in each of these four
5 instances the employee's position with NM Voices was terminated as a result of a
6 reorganization. NM Voices did not provide severance to an employee who –
7 like Mr. Griego –voluntarily placed himself in the position that led to his being asked to
8 leave NM Voices.

9 Because the severance payment to Mr. Griego would not be made according to
10 NM Voices' written policy or its past practice, the Commission cannot conclude that the
11 proposed severance payment would result from Mr. Griego's *bona fide* employment with
12 NM Voices that is genuinely independent of his candidacy, would be made exclusively in
13 consideration of services provided by Mr. Griego as part of his employment, or does not
14 exceed the amount of compensation which would be paid to any other similarly qualified
15 person for the same work over the same period of time. 11 CFR 113.1(g)(6)(iii)(A) and
16 (B). Accordingly, the severance payment would constitute a contribution under the
17 Commission's regulations at 11 CFR 113.1(g)(6)(iii)(A) and (B).

18 This response constitutes an advisory opinion concerning the application of the
19 Act and Commission regulations to the specific transaction or activity set forth in your
20 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
21 of the facts or assumptions presented, and such facts or assumptions are material to a
22 conclusion presented in this advisory opinion, then the requestors may not rely on that
23 conclusion as support for its proposed activity. Any person involved in any specific

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2 transaction or activity with respect to which this advisory opinion is rendered may rely on
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On behalf of the Commission,

Caroline C. Hunter
Chair