



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 15, 2013

MEMORANDUM

TO: Thomas Hintermister
Assistant Staff Director
Audit Division

FROM: Lisa J. Stevenson *LJS*
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Assistant General Counsel
For Public Finance and Audit Advice

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Attorney

SUBJECT: Proposed Interim Audit Report on Republican Party of Orange County (LRA 909)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Interim Audit Report (“IAR”) for the Republican Party of Orange County (“RPOC” or “the Committee”). The proposed IAR as submitted to us contained three findings: Misstatement of Financial Activity (Finding 1); Reporting of Debts and Obligations (Finding 2); and Use of Levin Fund Transfers (Finding 3). We concur with these three findings.

The Audit Division, however, did not include a finding pertaining to Recordkeeping for Salary and Wages due to a misunderstanding as to whether certain individuals engaged in work for the Committee should be considered employees for the purposes of 11 C.F.R. § 106.7(d)(1). We discussed this issue with the Audit Division, and we understand that the Audit Division will include a Recordkeeping finding on this issue in the proposed IAR as submitted to the Commission. We concur with this approach because we believe that a finding on this issue is warranted. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

II. THE MONTHLY LOG RECORDKEEPING REQUIREMENT APPLIES TO THE COMMITTEE'S "LEASED EMPLOYEES"

Section 106.7 requires state party committees to keep a monthly log of the percentage of time each employee spends in connection with a Federal election." 11 C.F.R. § 106.7(d)(1). To determine if a state party committee must allocate the salary, wages, and benefits of its employees, it must examine the percentage of time that its employees spent on federal election activity ("FEA") or activity in connection with federal elections. Salaries and benefits for employees who spend more than 25% of their compensated time on FEA or activities in connection with a federal election in a given month must be paid only from a federal account. 2 U.S.C. § 431(20)(A)(iv); 11 C.F.R. § 106.7(d)(1)(ii); see 2 U.S.C. § 441i(b)(2). Employees who spend less than 25% of their time on FEA or activities in connection with a federal election may be allocated as administrative costs or paid from the federal account. 11 C.F.R. § 106.7(d)(1)(i). Employees who spend none of their compensated time on FEA or activities in connection with a federal election may be paid entirely with funds that comply with state law. 11 C.F.R. §§106.7(c)(1) and (d)(1)(iii).

During an audit of the RPOC, the Audit Division determined that the Committee did not maintain a monthly log or any other supporting documentation for any of the individuals engaged in work on behalf of the Committee. All of these individuals were hired by the Committee, received compensation for their work, and their wages were processed through a payroll processing company for state and federal payroll tax purposes. According to the Audit Division, all of these individuals' salaries were allocated between federal and non-federal accounts. The total payroll paid by RPOC's federal and non-federal accounts during the audit period was \$331,498. Of this amount, \$189,962 was paid from the federal account, and \$141,536 was paid from the non-federal account.

The RPOC described these individuals as "leased employees" on its disclosure reports. This characterization of the employees' status is ambiguous as to whether an entity other than RPOC employed the individuals. The question, therefore, is whether these individuals were the employees of RPOC. We conclude that these "leased employees" are RPOC employees for the purposes of 11 C.F.R. § 106.7(d)(1).

First, an agreement between RPOC and Employers Resource, a payroll processing company, suggests that RPOC employed the individuals. The Audit Division provided us with a "Client Service Agreement" between the RPOC and Employer Resources pertaining to these leased employees.¹ The Client Service Agreement specifies that Employers Resource will provide payroll and related services for these "employees," as they are referenced in the Agreement, on behalf of RPOC. The Agreement further provides that Employers Resource and RPOC are each "co-employers" of the employees. The Agreement draws a distinction between

¹ The Client Service Agreement refers to the "Client" as the "Republican Central Committee of Orange County," and we understand from the Audit Division that the "Republican Central Committee of Orange County is the RPOC. We recommend that the Audit Division provide a copy of the Client Services Agreement to the Commission when submitting the IAR.

independent contractors and employees, providing that RPOC will not hire any individuals other than “employees” hired in conjunction with Employers Resource during the term of the Agreement, “other than as independent contractors.”

Under the Agreement, RPOC has the following authority and responsibilities:

- Recruits and selects the employees
- Supervises, directs, and controls the employees
- Hires, disciplines, and terminates the employees
- Funds pay and benefits
- Warrants that all employees except independent contractors will have payroll processed by Employers Resource.
- Complies with all applicable Federal, state and local laws governing the employment relationship.

Given these facts, RPOC clearly hires, fires, and directs and controls the activities of the employees. This kind and degree of authority strongly suggests that RPOC employs the individuals.

Second, RPOC appears to recognize that these leased employees are employees subject to 11 C.F.R. § 106.7(d)(1). In its FEC disclosure reports, the RPOC included amended language: “Amendment to update column B: Payments for Payroll and Fringe Benefits is for leased employees who spend less than 25 percent of their time on FEA, [*sic*] these payments are made to Employers Resource for leased employees. The Committee uses volunteers and employees. The Committee tracks employee time spent on federal election activity and federal campaigns on a monthly basis per Federal Election Commission regulation. No employee of the committee spent 25% or more of his or her compensated time on federal election activity.” See RPOC 2009 April Amended Report, filed Nov. 17, 2009, Image #29935454703, F3XA.

For these reasons, we conclude the “leased employees” are employees of RPOC for the purposes of 11 C.F.R. § 106.7(d)(1). RPOC, therefore, was required to “keep a monthly log of the percentage of time each employee spends in connection with a Federal election.” 11 C.F.R. § 106.7(d)(1).²

² In the Dallas County Republican Party audit, the Commission split 3-3 on the question of whether “contract laborers,” whom the Committee asserted were independent contractors, should be treated as “employees” for purposes of the monthly log requirement under 11 C.F.R. § 106.7(d)(1). Dallas County Republican Party (LRA #903) (Motion on Request for Commission Directive 69 Guidance involving the Dallas County Republican Party, considered in Executive Session October 16, 2012). Unlike in the Dallas County Republican Party audit, here the Committee, on its amended disclosure reports, characterizes the staff at issue as employees. Additionally, the terms of the Client Services Agreement make it clear that the individuals are employees, rather than independent contractors, of RPOC.