FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

OFFICE OF VICE CHAIRMAN

CONCURRING OPINION OF VICE CHAIRMAN SCOTT E. THOMAS

RE ADVISORY OPINION 1992-3

The Commission accepted the Office of General Counsel's recommendation that a company may pay fringe benefits to an employee who is granted leave without pay to campaign for federal office. The company has an established policy that limits the duration of the payment of fringe benefits to 31 days, and the Commission's opinion is limited to the facts presented. Nonetheless, I believe the basis for the Commisison's conclusion should be explained in a different way.

The regulations adopted by the Commission in 1976 and made effective in 1977 state as follows at 11 C.F.R. §114.12(c):

> A corporation ... may not pay the employer's share of the cost of fringe benefits, such as health and life insurance and retirement, for employees ... on leave-without-pay to participate in political campaigns of Federal candidates. The separate segregated fund of a corporation ... may pay the employer's share of fringe benefits, and such payment would be a contribution in-kind to the candidate. An employee ... may, out of unreimbursed personal funds, assure the continuity of his or her fringe benefits during absence from work for political campaigning, and such payment would not be a contribution in-kind.

This regulation makes no exception for fringe benefits payable during leave granted without pay pursuant to an established company policy or for a limited duration.

The Office of General Counsel's recommendation relied, in part, on 11 C.F.R. §100.7(a)(3)(iii) which provides: "No contribution results where the time used by the employee to engage in political activity is bona fide, although compensable, vacation time or other earned leave time." It was suggested that the leave here involved could be viewed as "other earned leave time" and that the fringe benefits could be seen as attaching to such leave.

I believe our counsel's interpretation misconstrues the regulations. The basic distinction built into the rules is

between leave and related benefits that are earned and leave and related benefits that are not. The former are a matter of right; the latter are given only at the discretion of the employer. Annual and sick leave that accrue based on the number of hours worked per pay period are examples of earned leave. Other examples would be maternity or paternity leave specifically authorized in the work rules and military or jury duty leave that the employer is required to provide. On the other hand, leave that is purely discretionary with the employer, such as leave granted with or without pay to attend school, serve in the legislature, or campaign for office, is not earned leave.

The explanation of the Commission's regulations at 11 C.F.R. §114.12(c) corroborates the foregoing interpretation:

> The prohibition in subsection (c) applies to corporations ... paying the cost of fringe benefits for employees ... who take leave-without-pay to work in political campaigns. It does not apply to the payment of fringe benefits for employees on annual leave or other leave which the employee has the right to take as a result of a contract and which may be used by the employee for any purpose.

House Doc. No. 95-44, 95th Cong., 1st Sess. (1977), at 117 (also published at 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶923 at 1613). This clearly demonstrates the Commission's intended distinction between leave that is discretionary with the employer and leave that is not. It also explains the interconnection between 11 C.F.R. §114.12(c) and 11 C.F.R. §100.7(a)(3)(iii).[1]

In the matter before us, it is not clear from the request whether the leave without pay for service in the legislature is available to employees as a matter of right. It is clear, however, that the leave without pay for campaigning for office is purely discretionary. The request indicates the company would

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1.The quoted explanation of the Commission's regulations also clarifies the conclusion reached in Advisory Opinion 1976-70, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶5217. That opinion specified:

> As for the other incidental benefits such as life and hospitalization insurance, absent a bona fide policy for employees on leave without pay, the Commission is of the opinion that the amount of the premiums paid for the insurance after the employee becomes a candidate and after he terminates his services for the corporation, will be considered a contribution. [emphasis in original]

The "bona fide policy" necessary to avoid the prohibition is one that would provide for leave as a matter of right.

"grant the employee's request for a leave of absence." Advisory Opinion Request dated Jan. 10, 1992, p. 2. Such leave, therefore, is not a matter of right and cannot be considered "other earned leave time" under 11 C.F.R. §100.7(a)(3)(iii). Instead, the leave and associated fringe benefits are covered by 11 C.F.R. §114.12(c), unless some other exception is crafted.

In my view, the Commission should simply swallow hard and say that the limited 31 day payment of fringe benefits here involved is viewed as a de minimis expense that will be allowed because it is very short in duration and insignificant in amount. That approach would not leave open the door to arguments that as long as the company has a preexisting policy allowing for discretionary leave to be granted to someone running for office, the associated fringe benefits can be paid.

In some cases it would be easy for an employer anxious to help an employee run for office to implement a discretionary leave policy that would permit payment of substantial fringe benefits over a six or eight month period (or however long the campaign lasts). Though the policy might look like it was designed to cover all employees, the discretion of management might be used to aid only the person running for office. This potential for abuse was, no doubt, the rationale for the regulations the Commission put in place fifteen years ago.

By suggesting that the leave here involved is "other earned leave time," the Commission will have a lot of explaining to do down the road, I fear. A de minimis exception to 11 C.F.R. §114.12(c) is not perfect, but it conveys a better sense of the limits that should apply in this area.

16 March 1992
Date

Scott E. Thomas
Vice Chairman