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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For Meeting of 10-9-14

September 26, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW by RMK*
Attorney

Subject: AO 2014-15 (Brat) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 5:00 pm (Eastern Time) on October 1, 2014.

For more information about how to submit comments, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2014-15

2
3 David Alan Brat
4 Dave Brat for Congress
5 P.O. Box 5094
6 Glen Allen, VA 23058

DRAFT B

7
8 Dear Mr. Brat:

9 We are responding to your advisory opinion request concerning the application of the
10 Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (formerly 2 U.S.C. §§ 431-457) (the
11 “Act”), and Commission regulations to your proposal for your employer to pay your share of
12 certain fringe benefits during your unpaid leave of absence to run for federal office. The
13 Commission concludes that the proposed payments are permissible under the Act and
14 Commission regulations.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on
17 September 3, and the email received from counsel on September 2, 2014.

18 You are a candidate for the U.S. House of Representatives in Virginia’s 7th District. You
19 have been employed by Randolph-Macon College (the “College”) since September 1, 1996, and
20 currently you are a full-time, tenured professor. The College is a corporation registered with the
21 Commonwealth of Virginia.

22 When you won the Republican nomination for the U.S. House of Representatives, the
23 College offered and you accepted an unpaid leave of absence for the duration of your campaign,
24 beginning August 8, 2014. You and the College have entered into a Memorandum of
25 Understanding (the “MOU”) setting forth the terms of your leave of absence. One of the terms
26 in the MOU provides for the continuation of fringe benefits for which you were eligible prior to
27 the leave of absence, including medical, life, and disability insurance. The MOU states that the

1 College will continue to provide its “financial insurance subsidy” for these benefits and requires
2 you to timely pay your portion of the premiums, as well. MOU at 2. Your benefits would be
3 continued for the duration of your unpaid leave, which would end when you return to work at the
4 College or resign to take office, depending on the outcome of the election, “but in no event later
5 than January 1, 2015.” *Id.*

6 Your benefits are being continued under the College’s pre-existing policy regarding the
7 continuation of fringe benefits during an employee’s leave of absence. The College’s Faculty
8 Handbook, which governs your employment, states that “[l]eaves of absence may be granted by
9 the Provost for such reasons and for such duration as the Provost believes are in the best interests
10 of the applicant and of the College. Recommendations on such leaves are made by the
11 Committee on the Faculty.” Email from Katherine Payne, Esq., to Joanna Waldstreicher,
12 Attorney, FEC at 1 (Sep. 2, 2014). According to the request, the College’s provost determines
13 whether to approve a faculty member’s request for a leave of absence, based on the reason for
14 and duration of the leave. Examples of appropriate reasons for approved leave include medical
15 reasons, government or military service, and professional advancement that also benefits the
16 College and its students. If the provost approves the leave request, the provost works with other
17 College staff to make determinations regarding benefits continuation, payment of remaining
18 salary, and details of the faculty member’s return to work, and these terms are memorialized in a
19 letter or MOU. For approved leaves of absence, “the Provost will generally approve the
20 continuation of benefits.” *Id.* at 2.

21 ***Question Presented***

22 *Are the terms of the MOU consistent with the Act and Commission regulations?*

1 ***Legal Analysis and Conclusions***

2 Yes, the MOU's provision concerning the College's payment of the employer portion of
3 your fringe benefits during your unpaid leave of absence would comply with the Act and
4 Commission regulations.

5 The Act prohibits a corporation from making any contribution in connection with a
6 federal election. 52 U.S.C. § 30118(a), (a)(2) (formerly 2 U.S.C. § 441b(a), (a)(2)); *see also* 11
7 C.F.R. § 114.2(b). Accordingly, Commission regulations specifically provide that a corporation
8 may not pay the employer's share of the cost of fringe benefits, such as health and life insurance,
9 for an employee who is on leave without pay to participate in the campaign of a federal
10 candidate. 11 C.F.R. § 114.12(c)(1). Commission regulations also provide, however, that a
11 corporation's payment of compensation to an employee does not result in a contribution from the
12 corporation where the employee engages in campaign activity on *bona fide* vacation time or
13 other earned leave time. 11 C.F.R. § 100.54(c). Thus, under section 113.1(g)(6), any
14 compensation paid to a candidate is a contribution to that candidate unless:

- 15 (A) The compensation results from *bona fide* employment that is
16 genuinely independent of the candidacy;
- 17
- 18 (B) The compensation is exclusively in consideration of services
19 provided by the employee as part of this employment; and
- 20
- 21 (C) The compensation does not exceed the amount of
22 compensation which would be paid to any other similarly qualified
23 person for the same work over the same period of time.
- 24

25 11 C.F.R. § 113.1(g)(6)(iii).

26 In Advisory Opinion 1992-03 (Reynolds Metal Company) ("Reynolds"), the Commission
27 determined that a federal candidate on unpaid leave could continue to receive full benefits for 31
28 days after the employee's last day of work pursuant to his company's general approved leave

1 without pay policy. In doing so, the Commission reconciled 11 C.F.R. §§ 114.12(c)(1) and
2 100.54 by looking at three operative facts: (1) the corporate employer had “a pre-existing policy
3 covering fringe benefits and unpaid leave which [was] generally applicable to all employees”;
4 (2) “the period of time during which [the corporate employer] [would] continue to provide fringe
5 benefits [was] relatively brief”; and (3) “the described extension of these benefits [could] be
6 viewed as a form of compensation payable to the employee by [the corporate employer] and as
7 part of ‘other earned leave time.’” AO 1992-03 at 2. An examination of these same facts in this
8 Request indicates that the proposed MOU’s provision concerning the College’s payment of the
9 employer portion of your fringe benefits during your unpaid leave of absence would also comply
10 with the Act and Commission regulations.

11 First, the Request makes clear that your benefits are being continued “under a pre-
12 existing policy by the College to cover fringe benefits during a leave of absence.” AOR at 1.
13 Indeed, “[t]his policy is generally applicable to all employees of the College, and not one which
14 was created for this particular situation.” *Id.* Thus, as in Reynolds, the College’s policy “is
15 apparently not one created for the benefit of a particular employee-candidate.” AO 1992-03 at 2;
16 *see also* AOR 2014-14 (Trammell) (applying the same policy to another federal candidate).

17 Second, the Request states that you will receive benefits from the College until no later
18 than January 1, 2015. As in Reynolds, this period is fixed and “relatively brief.”

19 Finally, all full-time professors like yourself are entitled to take a leave of absence by
20 virtue of their position, provided the College deems it to be “in the best interests” of the
21 requestor and the College. AOR at 5. Thus, the leave of absence and associated continuation of
22 benefits may be viewed as a form of conditional compensation and leave earned or accrued by
23 employees who garner “faculty rank” and thus are governed by the Faculty Handbook. *See id.*

1 As with the AO 1992-03, the Requestor proposes to receive fringe benefits pursuant to a
2 pre-existing policy to cover fringe benefits during a leave of absence, for a relatively short period
3 of time, where the leave of absence and associated benefits may be viewed as a form of earned or
4 accrued compensation and leave. Further, the proposed benefits result from employment that is
5 clearly independent of your candidacy and is exclusively in consideration of services provided
6 by the employee and offered to other similarly qualified persons over the same period, as evident
7 by the Faculty Guide, College policy, and the extension of similar terms to other individuals on
8 leave without pay for similar time periods. *See* AOR 2014-14 (Trammell). Therefore, the
9 MOU's provision concerning the College's payment of the employer portion of your fringe
10 benefits during your unpaid leave of absence would comply with the Act and Commission
11 regulations.

12 This response constitutes an advisory opinion concerning the application of FECA and
13 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
14 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a
15 change in any of the facts or assumptions presented, and such facts or assumptions are material
16 to a conclusion presented in this advisory opinion, then the requestor may not rely on that
17 conclusion as support for its proposed activity. Any person involved in any specific transaction
18 or activity which is indistinguishable in all its material aspects from the transaction or activity
19 with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See*
20 52 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f(c)(1)(B)). Please note that the analysis or
21 conclusions in this advisory opinion may be affected by subsequent developments in the law
22 including, but not limited to, statutes, regulations, advisory opinions, and case law. Any
23 advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Lee E. Goodman
Chairman