

MEMORANDUM

To: Election Commissioners
From: Tony Ventura, Election Commissioner
Re: Proposed Amendment to San Jose Municipal Code
Date: September 5, 2007

I. ISSUE

Should the City of San Jose require that any amount of time spent by an employee at the direction of an employer be considered a "contribution" subject to the City reporting requirements?

II. LAW

The law relevant to this issue is addressed in two memoranda prepared by the City Attorney. The memos are dated April 7, 2005 and August 12, 2005. Copies are provided with this memorandum as well.

California state law defines a "contribution" to include the payment of compensation by any person for personal services performed by another person if the services are rendered for a candidate or committee without payment of full and adequate consideration by the candidate or committee. Fair Political Practices Commission, 2 CCRSection 18423. The state law specifically defines a contribution to occur where an employee spends more than 10% of their time on a campaign and is compensated by the employer. Fair Political Practices Commission, 2 CCRSection 18423. In the Heacock Advice Letter, FPPC No. A-90-421, the cost of an employee that spends less than 10% of their time per month at the direction of their employer is not considered a contribution because the amount of time spent is considered to be de minimus.

In one section, the San Jose Municipal Code states that the definitions contained in the Code have the same meaning as provided by the FPPC unless specifically provided for in our Code. San Jose Mun. Code Section 12.02.020. However, San Jose Municipal Code Section 12.06.010 states that our Code shall be interpreted in accordance with state law. As such, any amendment increasing the requirements established by state law should also amend San Jose Municipal Code Section 12.06.010.

San Jose Municipal Code Section 12.06.050 defines a "contribution" to include "the payment of compensation by any person for the personal services or expenses of any other person, if such services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration...." The San Jose Municipal Code does not make any reference to a dollar amount or time limit for the definition of a contribution and, as such, defers to state law.

III. ANALYSIS

A. Advantages and Disadvantages to a Proposed Amendment

For purposes of discussion and consideration, certain advantages and disadvantages exist with a proposed amendment to expand the definition of "contribution" to include an employer's payment of an employee's services to work on a campaign where the time spent is less than 16 hours a month.

The current law allows an employer to direct an employee to spend up to 10% of his or her time each month working on a campaign without it being considered a contribution that must be reported. Consider a 20-person company where the employer directs each employee to spend 16 hours a month working on a campaign. Further suppose each worker is paid \$10 an hour. In this example, the employer can provide 320 hours of work at a cost of \$3,200 without it having to be reported. As such, there are several advantages to requiring all such activity be included within the reporting requirements. First, an amendment could close a significant loophole in the existing Code. Second, the reporting requirement would make the elections and campaign contributions more transparent. Finally, a zero tolerance reporting requirement is easier to monitor than a system linked to monthly percentages.

At the same time, certain disadvantages exist. First, the proposed amendment would still be difficult to monitor and could probably only be enforced after someone comes forward and discloses a violation. Second, time is not the equivalent of money. For example, an employee may be paid \$40 an hour for his or her job. However, the work at a campaign stuffing envelopes may only have a market value of \$10 an hour. Therefore, the value of the contribution may be different from the salary paid to an employee. Third, this reporting requirement may be tremendously burdensome depending upon the number of instances where this occurs.

B. Proposed Amendment to San Jose Municipal Code

First, if the Elections Commission makes a proposal, we should amend San Jose Municipal Code Section 12.06.010 to state that the FPPC definitions control, except as specifically made different by our Code. As such, Code Section 12.06.010 should mirror Section 12.02.020.

Second, for purposes of discussion, the Elections Commission could consider the following proposal further dividing Code Section 12.06.050(A)(3) into subsections (A)(3), (4) and (5):

"(A) 'Contribution' shall mean:

(3) Contributions include the purchase of tickets for events such as dinners, luncheons, rallies and similar fund-raising events, the granting of discounts or rebates not extended to the public generally or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office;

(4) The payment of any compensation for any amount of time by any person or entity for the personal services or expenses of any other person, if such services are rendered or expenses incurred on behalf of a candidate or committee

in relation to a City campaign or election without payment of full and adequate consideration by said candidate or committee wherein this Code specifically defines said contribution to be broader than as defined in the Fair Political Practices Commission at 2 Cal.Admin. Code Section 18423.” [Amended language underlined.]

(5) The transfer of anything of value.

Finally, I would decline to amend the requirements subject to vacation time for the reasons stated in the City Attorney Memorandum dated August 12, 2005.

IV. FURTHER RESEARCH

I still need to work with the City Attorney’s Office to obtain research from other cities such as Oakland, San Francisco, Los Angeles and San Diego to see if said cities have made similar requirements and, if so, the language used to do so.