

Memorandum

TO: San Jose Elections Commission

FROM: Hanson Bridgett

DATE: August 5, 2009

RE: Citizen Complaint

Complainant: **Lee Price, City Clerk**

Respondent: **Sidney T. Scarlett; Committee to Elect Ted Scarlett**

Alleged Violations: **Late Campaign Contribution
Late and incomplete Contribution Statement Reporting**

Complaint Filed: **June 9, 2009**

I. INTRODUCTION

Pursuant to a Complaint filed on June 9, 2009, we conducted an investigation to determine whether Sidney T. Scarlett, or the Committee to Elect Ted Scarlett (collectively "Respondent") violated Title 12 of the San Jose City Municipal Code ("Municipal Code") by accepting a campaign contribution after the close of the campaign contribution collection period. In addition, we sought to determine whether the Respondent violated the Municipal Code by filing late campaign contribution statements, by failing to pay the resulting late fees, and by failing to file amended campaign contribution statements as required.

II. EXECUTIVE SUMMARY

We recommend that the Elections Commission find that the evidence in the case establishes violations of the Municipal Code. Specifically, we find that the evidence shows:

1. Respondent improperly accepted a contribution in the amount of \$250 almost five months after the end of the campaign contribution period.
2. Respondent failed to file timely campaign contribution statements (Form 460) despite repeated notice from the City Clerk.

3. Respondent failed to pay the required fines for filing campaign contribution statements late. Pursuant to the Political Reform Act, such fines, in the total amount of \$200, are not waivable, and are in addition to any penalty the Commission may assess for a violation of the Municipal Code.

4. Pursuant to the Municipal Code, Respondent's un-retired campaign debt automatically converted to a contribution six months following the election. At that time, Respondent was therefore technically required to amend his campaign contribution statements to reflect the changed status of the unpaid loan. Respondent has not filed such an amended campaign contribution statement and should be notified of this obligation. While perhaps hyper-technical in nature, upon such notice, a failure to amend would be an additional violation of the Municipal Code.

III. JURISDICTION OVER THE COMPLAINT AND DETERMINATION AS TO CAUSE FOR INVESTIGATION

A copy of the Complaint is attached as **Exhibit A**. Pursuant to a review of the Complaint and the relevant statutory provisions, the Evaluator determined that the Complaint alleged violations of the Municipal Code. Specifically, the Complaint alleged that Respondent accepted a late campaign contribution in violation of Municipal Code 12.06.290. In addition, although not directly alleged in the Complaint, the facts raised presented the issues of an improper retirement of debt in violation of Municipal Code 12.06.710, and a late and inaccurate contribution statement filing in violation of Municipal Code 12.06.910.

IV. FACTUAL SUMMARY

Respondent was a candidate for City Council in the second district on the June 3, 2008 primary. On March 5, 2008, Respondent properly filed with the City Clerk forms 500 and 501, establishing his candidacy. Respondent additionally filed in a timely fashion the two pre-election campaign statements (Form 460) due on March 24, 2008 and May 22, 2008. (**EXHIBIT A**)

Respondent was not successful in the June 3, 2008 election. After the election, however, Respondent did not terminate his campaign committee or file subsequent campaign statements in a timely fashion. Between January 21, 2009 and March 24, 2009, the City Clerk sent Respondent a series of emails and letters, some by Certified Mail, advising Respondent of his obligation to file campaign statements and/or terminate his committee. (**EXHIBIT A**) On March 25, 2009, Respondent filed campaign statements for the period May 18, 2008 through March 25, 2009 and also filed a Statement of Termination of Committee. (**EXHIBIT A**)

Three items on the campaign statements are of particular relevance to this Complaint:

- The Form 460 campaign statement for the period March 18, 2008 through May 17, 2008 reports a loan made by Respondent to his campaign in the amount of \$1,500.

- The Form 460 campaign statement for the period July 1, 2008 through December 31, 2008 reports a contribution made on October 14, 2008 from Barry Swenson in the amount of \$250.
- The Form 460 campaign statements reflect that Respondent made periodic, incremental payments on the \$1,500 loan. In particular, Respondent used the \$250 October 14 contribution to pay back part of the \$1,500 loan such that on terminating the committee, \$625.05 of the debt was outstanding.

On May 4, 2009, the City Clerk sent Respondent a letter by certified mail notifying him (a) that the campaign statements for the period May 18, 2008 through March 25, 2009 had been filed late, (b) that because the filing was late, Respondent owed the City a \$200 late fee, and (c) that review of the filing indicated that the October 14, 2008 contribution was received after the end of the campaign contribution period in violation of Municipal Code section 12.06.290. The City Clerk instructed Respondent to return the illegal contribution or else the matter would be referred to the Elections Commission. **(EXHIBIT A)** Respondent never accepted delivery of the letter. Respondent later told the Commission's investigator that he is too busy to go to the post office to collect certified mail.

Having heard nothing from Respondent, the City Clerk filed this complaint on June 9, 2009.

V. LEGAL AUTHORITY

Relevant legal authority related to this investigation is found in the Municipal Code, and the Political Reform Act (California Government Code §81000 et seq.)

A. Municipal Code

The Municipal Code contains the following provisions relevant to this investigation:

1. 12.06.290 Campaign Contribution Collection Period.

A. No person shall solicit or accept any campaign contribution or deposit any contributions for any campaign into any municipal campaign bank account except during the campaign contribution period.

B. The campaign contribution period for the primary municipal election for council or mayor shall:

1. Begin on the one hundred eightieth (180th) day before the primary municipal election.
2. End at midnight on the seventeenth (17th) day prior to the primary municipal election.

C. The campaign contribution period for the run-off municipal election for council or mayor shall:

1. Begin on the day after the primary municipal election for that office.
2. End at midnight on the seventeenth (17th) day prior to a run-off municipal election for that office.

D. Any contribution which is received outside of the campaign contribution period for an election shall not be accepted or deposited but shall be returned to the contributor or donor within five (5) business days.

2. 12.06.710 Deadline for debt retirement.

A. No money can be collected for debt retirement after the end of the campaign contribution collection period as set forth in Section 12.06.290.

B. A candidate must retire all campaign-related debts, including loans, within six months after the date of the election.

C. A campaign-related debt, including any loan, which remains unpaid more than six months after the election is deemed to have been a campaign contribution which was accepted at the time the debt was incurred.

D. It is a violation of this section to forgive all or part of a loan or debt which is owed to the person by a candidate and which exceeds the applicable contribution limitations. Forgiveness of a loan or debt shall not be deemed to include the failure to collect the loan or debt where there have been substantial attempts, in good faith, to collect the monies owed and such efforts have proved unsuccessful. In such case, a candidate is not exonerated from violations of this chapter if an outstanding loan or debt exceeds the contribution limitations.

3. 12.06.910 Statements and Reporting Requirements.

A. Each candidate and each committee, except committees whose sole purpose is to support or oppose a ballot measure, shall file, as a public record with the city clerk, cumulative itemized reports at the times specified herein showing the total amounts of contributions accepted and expenditures made. The required statements may be completed on campaign statement forms required to be filed by the regulations of the Fair Political Practices Commission so long as such forms are completed in sufficient detail to comply with the requirements of this chapter. Such statements shall contain a declaration by the candidate or committee treasurer that the candidate or committee has neither accepted nor solicited any campaign contribution in excess of the limitations of this chapter.

B. The listing of contributions shall include all contributions accepted during the campaign contribution collection periods specified in this chapter including all amounts less than one hundred dollars.

C. The first and second campaign statements shall be filed at the times prescribed for pre-election statements by the Political Reform Act. The second statement shall in addition include all contributions accepted through the end of campaign contribution collection period specified in Section 12.06.290.

D. Thereafter, semi-annual statements shall be filed in the form and at the times required by the regulations of the Fair Political Practices Commission.

B. Political Reform Act.

The Political Reform Act, and implementing regulation, contain the following provisions relevant to this investigation:

1. Govt. Code 91013

(a) If any person files an original statement or report after any deadline imposed by this act, he or she shall, in addition to any other penalties or remedies established by this act, be liable in the amount of ten dollars (\$10) per day after the deadline until the statement or report is filed, to the officer with whom the statement or report is required to be filed. . . . [N]o liability shall be waived if a statement or report is not filed within . . . five days for a campaign statement required to be filed 12 days before an election, and 10 days for all other statements or reports, after the filing officer has sent specific written notice of the filing requirement. . . .

(c) The officer shall deposit any funds received under this section into the general fund of the jurisdiction of which he or she is an officer. No liability under this section shall exceed the cumulative amount stated in the late statement or report, or one hundred dollars (\$100), whichever is greater.

2. Govt. Code 81004.5

Any report or statement filed pursuant to this title may be amended by the filer at any time. Amending an incorrect or incomplete report or statement may be considered as evidence of good faith.

3. California Code Regulations 18110 (c)(3)

In those cases where the filing officer discovers in his or her review of campaign statements that a candidate or committee has filed an incorrect, incomplete or illegible campaign statement or a campaign statement which cannot be reproduced, he or she shall promptly notify the candidate or committee of the error or omission.

VI. CONDUCT OF THE INVESTIGATION

The first step in any investigation is to ensure that Respondent has proper notice of the complaint. Notifying Respondent of the complaint here was difficult. The Evaluator sent a copy of the Complaint to Respondent by Certified Mail, fax, and email. (**EXHIBIT B**) Respondent did not accept delivery of the Certified Mail. The fax number provided by Respondent on his filings with the City was not correct. The email went unanswered. A copy of the Complaint was emailed to Respondent on July 2, 2009. Telephone calls to Respondent were also not answered or returned.

After failing to solicit any response from our telephone messages, emails, and certified mails, we asked the Commission's Investigator to help make contact with Respondent. As a result of the Investigator's efforts, we finally conducted an interview over the telephone with Respondent on July 16, 2009. It is not clear whether Respondent had reviewed the complaint prior to that interview.

Following our initial conversation with Respondent on July 16, we had some follow-up questions but continued to have difficulties communicating with him (**EXHIBIT B**). We made multiple additional efforts to provide Respondent with a copy of the Complaint both via electronic mail and personal service. (**EXHIBIT C**) While we asked for confirmation of receipt of the Complaint, we heard nothing back. On July 24, 2009, we received from Respondent a copy of a check returning the campaign contribution that is at the heart of this Complaint. (**EXHIBIT D**) The implication we draw from this check is that Respondent has received a copy of the complaint.

In our single conversation with Respondent, he was adamant that our report reflect his opinion that the Complaint represents a vendetta on the part of the City Clerk's office to control the outcome of City elections and is a vicious and unwarranted personal attack against him. Our investigation revealed no such vendetta. Nor do we find any personal animus against Respondent on the part of the City Clerk. Our many years of closely coordinated work with the City Clerk do not lead us to give any credibility to Respondent's allegations.

Also as part of our investigation, we reviewed the Form 460 Campaign Statements filed by Respondent and conducted interviews with City Clerk Lee Price (as well as emails with her staff), Barry Swenson, and Mr. Swenson's assistant, Allyson LaBarreare.

VII. FACTUAL FINDINGS AND ANALYSIS OF ISSUES

A. Late Campaign Contribution

Pursuant to Municipal Code Section 12.06.290, no candidate may accept third-party campaign contributions for a primary city council election beginning with the 16th day prior to the election. For the June, 2008 primary election, this cutoff day fell on May 17, 2008.

Respondent's Form 460 Campaign Disclosure Statement filed for the period July 1, 2008 --December 31, 2008 discloses a contribution received from Barry Swenson on October 14, 2008, well after the June 3 election and the May 17 contribution period ending date. (**EXHIBIT A**) Mr. Swenson did not recall making the contribution, but neither he nor his assistant denied making the contribution nor thought it unusual that they would not have any recollection of the contribution.

Respondent told us that he did not know of the rule prohibiting the acceptance of contributions after the election and pointed out that he made no effort to hide the late contribution. But the City Clerk provides all nominated candidates with a "candidate binder" of important information, including a document, easily available on the City's website, that sets forth all contribution deadlines. (See "Important Dates to Remember for Candidates" **EXHIBIT E**). On March 5, 2008, Respondent signed a form certifying that he had been provided with this information. (**EXHIBIT F**) Respondent's excuse that he was not aware of the contribution rules is therefore unpersuasive.

When we informed him on July 16, 2009 of the rule in the Municipal Code, Respondent told us that he was going to return the contribution. Respondent has provided us with a copy of a Cashier's check dated July 16, 2009 made out to Mr. Swenson with the notation, "Return of Campaign Contribution."

Section 12.06.290 requires that contributions received outside the campaign contribution period should be returned to the contributor within five business days. Even if Respondent did not know of the rule prohibiting the acceptance of late contributions, the City Clerk notified Respondent of the requirement that he return the contribution on May 4, 2009.¹ Respondent returned the contribution only on July 16, 2009 in response to this Complaint.

We conclude that accepting the October 14 contribution was in violation of the contribution collection period set forth in section 12.06.290.

B. Improper Retirement of Campaign Debt

Pursuant to Municipal Code Section 12.06.710, no money may be collected for debt retirement after the end of the contribution period described above.

Respondent's Form 460 Campaign Disclosure Statement for the period March 18, 2008-May 17, 2008 reveals that Respondent loaned his campaign \$1,500. (**EXHIBIT A**) There is nothing improper about this loan.

As discussed above, Respondent received a \$250 contribution on October 14, 2008, after the close of the campaign contribution period. The Form 460 reveals that at least \$200 of the \$250 was used to retire, in part, the \$1,500 loan that Respondent made to his own campaign. When Respondent terminated his campaign committee, he used the \$74.95 remaining in the account to pay back his loan. \$50 of this amount must have derived from the improper \$250 contribution as no other funds existed in the campaign account.

¹ The Clerk's notification was by Certified Mail that went unclaimed.

Respondent has now returned the improper \$250 contribution. However, section 12.06.710 does not include any allowances for the return of contributions impermissibly collected for debt retirement.² At the time Respondent solicited the contribution from Barry Swenson, the campaign was long over and the only possible purpose for the use of the contribution was for the retirement of debt.

We conclude that by collecting a \$250 contribution to retire campaign debt, Respondent violated section 12.06.710.

C. Late Filing of Campaign Statements

Pursuant to Municipal Code section 12.06.910, and also as required by the Political Reform Act, Candidates are required to file Form 460 Campaign Disclosure Statements by the appropriate deadlines until terminating a campaign committee. This obligation does not automatically end if a candidate loses an election. Even though Respondent did not win the primary election held on June 3, 2008, he did not terminate his campaign committee and therefore continued to have filing obligations. The relevant filing deadlines here were July 31, 2008 for the period May 18, 2008-June 30, 2008,³ and January 31, 2009 for the period July 1, 2008-December 31, 2008. All of these deadlines, as well as the obligation to terminate a committee or continue to make the required filings, were included in the "candidate binder" provided to Respondent by the City Clerk. **(EXHIBIT F)**

Respondent did not timely file the two Form 460 forms for 2008. Between January 21, 2009 and March 24, 2009, the City Clerk contacted Respondent a number of times, by email, regular mail, and eventually by Certified Mail, to remind him of these continuing obligations. **(Exhibit A)** Only after these numerous reminders from the City Clerk did Respondent file the required statements, along with a Statement of Termination, on March 25, 2009. **(EXHIBIT A)** On that date, Respondent was more than 50 days late filing the Form 460 due on January 31, 2009 and more than 200 days late filing the Form 460 due on July 31, 2008. Such late filing is a violation of section 12.06.910. In addition, the City Clerk sent a second notice on May 4, 2009. **(EXHIBIT A)**

Pursuant to the Political Reform Act, late fees in the amount of \$10 per day--up to a \$100 maximum for each late filing --apply to the late filing of semi-annual statements. Such late fees are mandatory, and may not be waived, if a candidate files a Form 460 more than 10 days late, provided that the "filing office," here the City Clerk, sends written notice of the filing requirement. (See Govt. Code 91013) The City Clerk sent Respondent just such a notice on February 20, 2009. **(EXHIBIT A)**

² For instance, 12.06.290 requires a return within 5 days and 12.04.130 states that returning in a timely fashion a contribution in excess of a contribution limit removes any possible violation. No such provision exists with regard to 12.06.710.

³ The period from January 1--May 17, 2008 was covered by more specific pre-election filing requirements with which Respondent complied.

We conclude that the Respondent, in addition to any other penalties the Elections Commission chooses to impose pursuant to its authority under the Municipal Code, is liable to the City in the amount of \$100 for each of the two late filings of the Form 460.

D. Incorrect Filing--Requirement to Amend

Pursuant to Municipal Code Section 12.06.290, any debt left unpaid six months after the election is deemed to have been a campaign contribution which was accepted at the time the debt was incurred. The purpose of this rule appears to be to ensure that loans, especially those from third parties, that are later forgiven are classified as contributions. Of course, when a loan is from the candidate himself, the difference between an unpaid loan and a contribution is one of terminology and not of any substance. Nevertheless, section 12.06.290 does not differentiate between loans from candidates and loans from third parties.

On November 3, 2008, 6 months after the June 3, 2008 primary, Respondent's Form 460 filings indicate that he had at least \$700 unpaid on the \$1,500 loan he made to his own campaign.⁴ According to section 12.06.290, this amount should thereupon have been converted to a contribution, dated as of the time of the original loan. The loan was reported on the Form 460 for the period March 18, 2008--May 17, 2008. That Form 460 is now technically incorrect and should be amended. In addition, having returned the \$250 contribution, the campaign statement reflecting this contribution should also be amended. Pursuant to the FPPC regulations, upon discovery of an incorrect campaign statement, the City Clerk should notify the candidate of the error. Under the Political Reform Act, the candidate then has the opportunity to amend the incorrect filing. The evidence does not indicate that the Respondent has been notified of the requirement to file an amended Form 460 re-categorizing the remaining unpaid debt as a contribution.

We therefore do not find that the failure to file an amended Form 460 is a violation of the Municipal Code. Respondent had no notice of the obligation to re-file. Moreover, reclassifying a loan to oneself as a contribution to oneself is a technical difference that does not necessarily serve a useful purpose.⁵ However, upon such notice, a failure to file an amended report would become a violation.

⁴ Respondent paid back \$600 of the loan during the period between May 18, 2008 and June 30, 2008. He paid a further \$200 during the period between July 1, 2008 and December 31, 2008. But this \$200 came out of the improper \$250 contribution which has now been returned, increasing the balance on the loan. He paid back an additional \$74.95 when he terminated his committee. \$50 of this must also have been from the improper \$250 contribution. The actual unpaid amount of loan is therefore more properly classified as \$875.05

⁵ Amending the Form 460 to reflect the return of the \$250 contribution might have value separate from the reclassification of the unpaid loan to a contribution.

VIII. RECOMMENDATIONS

We recommend that the Elections Commission find that Respondent has violated:

- (a) Section 12.06.290 for accepting a \$250 contribution after the end of the campaign contribution periods;
- (b) Section 12.06.710 for using the \$250 contribution to retire campaign debt; and
- (c) Section 12.06.910 for failing to file two campaign statements in a timely fashion.

The Commission may consider the imposition of penalties under the Municipal Code with respect to the violations specified above. The general rule for civil penalties under Section 12.04.110 authorizes the Commission to impose penalties of up to \$5,000 per violation or 3 times the amount which a respondent failed to properly report or unlawfully contributed, expended, gave or received, whichever is greater.

More specifically, regarding the violation specified in (a) above for accepting a contribution after the end of the campaign contribution period, in determining the penalty, Section 12.04.120 directs the Commission to consider the relevant circumstances surrounding the case, such as:

- The severity of the violation;
- The presence or absence of any intention to conceal, deceive, or mislead;
- Whether the violation was deliberate, negligent or inadvertent;
- Whether the violation was an isolated incident or pervasive enough to indicate a pattern of disregard for this chapter;
- Whether the respondent has a prior record of violations of city law relating to campaign finance, lobbying, conflicts of interest, or governmental ethics;
- The degree to which the respondent cooperated with the investigation;
- Whether or not corrective actions were taken, if appropriate, in accordance with the provisions of this chapter.

The record reflects that the Respondent was very difficult to reach during the course of the investigation. However, once the Evaluator was able to discuss certain elements of the Complaint with the Respondent, Respondent did return to Barry Swenson the \$250 contribution.

With respect to the violation specified in (c) above regarding the late filing of two campaign statements, Respondent has not paid the City the two maximum fees totaling \$200 as required by Government Code Section 91013 in the Political Reform Act for filing two campaign

Memorandum To:
San Jose Elections Commission
August 5, 2009
Page 11

statements more than ten days late. In addition, Section 12.04.120 B states that "A Candidate or Committee failing to file a late contribution report pursuant to Section 12.06.910 shall be required to pay a penalty in an amount imposed by the Commission pursuant to Section 12.04.110, but not less than \$1,000."

Finally, we call to the Commission's attention Respondent's obligation, upon notice from the City Clerk, to file an amended Form 460 reflecting the changed status of the unpaid loan to that of a contribution.

Respectfully submitted,

Joan L. Cassman
M. D. Moye
Steven Miller

Memorandum To:
San Jose Elections Commission
August 5, 2009
Page 12

ATTACHMENTS TO REPORT OF INVESTIGATION (ON FILE IN THE OFFICE OF THE CITY CLERK)

EXHIBIT A The Complaint
EXHIBIT B Letter to Respondent from Evaluator Dated June 30, 2009
EXHIBIT C Email to Respondent from Evaluator dated July 21, 2009
EXHIBIT D Copy of Cashiers Check from Respondent to Barry Swenson
EXHIBIT E City of San Jose Municipal Elections 2008 Important Dates To Remember
EXHIBIT F Respondent Acknowledgment of Receipt of Candidate Binder