



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 15, 1982

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1982-42

William F. White
Associate General Counsel
National Treasury Employees Union
Suite 1101
1730 K Street, N.W.
Washington, D.C. 20006

Dear Mr. White:

This refers to your letters of May 4 and May 27, 1982, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended, ("the Act"), to the reimbursement of various expenses paid by the separate segregated fund of the National Treasury Employees Union ("NTEU").

The facts as set forth in your letters indicate that during the years 1979, 1980, and 1981, the Treasury Employees Political Action Committee ("TEPAC"), the separate segregated fund of NTEU, made payments totalling approximately \$43,327 for a variety of expenses incurred by TEPAC in connection with its establishment, administration, and contribution solicitations. Your letters explain that these costs included: printing and mailing of contribution cards and solicitation letters to NTEU members, computer and data processing services to produce and send such materials, accounting and auditing services related to TEPAC, franchise taxes paid to the District of Columbia, and office supplies for TEPAC. You assert that these expenses were paid over this period of time because the treasurer of TEPAC was under the "mistaken impression" that NTEU could pay the establishment, administration, and solicitation costs for TEPAC only if those costs were partially attributable to NTEU on a percentage basis; e.g. salaries, telephones, cost of office space, etc. You further explain that:

conversely, establishment, administration, and solicitation costs which were wholly and segregably attributable to TEPAC were paid with TEPAC funds during this period of time. Such costs included solicitations contracted out to a private firm, or clearly segregable legal, accounting, or data processing fees.

You have requested an opinion that would permit NTEU to reimburse TEPAC for those administrative, establishment and solicitation costs that were "inadvertently paid" by TEPAC during the years 1979, 1980, and 1981. The Commission concludes that such reimbursement would not be lawful under the Act and Commission regulations.

As you know, 2 U.S.C. 441b prohibits a labor organization from making any contribution or expenditure in connection with any election to Federal office. The cited 441b defines "contribution or expenditure" to include any direct or indirect payment of money to any campaign committee or political party or political organization. 2 U.S.C. 441b(b)(2). Accordingly, NTEU as a labor organization is prohibited by 441b from making payments to TEPAC, a political organization that is a committee fund organized and operated primarily for the purpose of accepting contributions or making expenditures to influence, or attempt to influence, the nomination or election of any individual to Federal office. See 2 U.S.C. 431(4)(B); also see 26 U.S.C. 527(e). A specific exception to the 441b prohibition permits the expenditure of labor organization treasury money for the "establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a... labor organization..." 2 U.S.C. 441b(b) (2) (C). Commission regulations explain and give specific examples of the types of expenses that may be paid under this exception. 11 CFR 114.1(b). These regulations were prescribed on April 13, 1977, 42 FR 19324, having been published on August 25, 1976, at 41 FR 35932, 35956.

While it appears that 11 CFR 114.1(b) would have permitted NTEU to pay the described expenses initially from its general treasury consisting of dues monies paid by its membership, it does not follow that TEPAC's payment of the expenses over a 3 year period may now be reimbursed from NTEU's treasury funds. Commission regulations provide that a separate segregated fund such as TEPAC may not utilize money comprised of dues or fees required as a condition of membership when it makes contributions or expenditures in Federal elections. 11 CFR 114.5(a)(1). The regulations also provide that the cited exception for administrative costs may not be used to exchange treasury monies for voluntary contributions to the separate segregated fund. 11 CFR 114.5(b) To permit NTEU to reimburse TEPAC in the circumstances presented would involve an impermissible exchange of treasury funds in that the contribution fund would receive restitution from the NTEU treasury for monies that had been purposely, albeit unnecessarily, spent from the contribution fund. The proposed reimbursement would also provide funds to TEPAC that, in turn, would be available for direct contributions or expenditures in Federal elections. Such a use of union treasury or dues monies is barred by the Act and Commission regulations. 2 U.S.C. 441b(b)(3)(A), 11 CFR 114.5(a), (b).

TEPAC had discretion to make the described disbursements from its voluntary funds, and the fact that in doing so the treasurer "erred on the side of caution" does not offer a basis for now, some 3 years later, permitting a different discretionary decision to take full advantage of the exceptions to 2 U.S.C. 441b. The request argues that such a change should be permitted because the initial payments by TEPAC in 1979, 1980, and 1981 were "inadvertently made" as a result of the treasurer's "mistaken impression" as to the interpretation and application of the Act and Commission regulations. This argument attempts to characterize the facts in this opinion as materially indistinguishable from those in two prior advisory opinions where the Commission concluded that two labor organizations could make reimbursing payments to their respective

separate segregated funds. The Commission concludes that the facts in those opinions are materially distinguishable from those present here. Therefore, the holdings of those opinions are not applicable here.

In responding to Advisory Opinion Request 1976-111 on January 5, 1977, the Commission permitted a labor organization to reimburse its separate segregated fund for a legal service fee (approximately \$250) which the fund inadvertently paid. The fee was incurred to obtain an opinion from counsel as to the lawful establishment and formation of the political fund. It was paid in late 1976 before final Commission regulations were prescribed and when there was some uncertainty as to the status and interpretative effect of what were then proposed Commission regulations whose 30 day Congressional review period, 2 U.S.C. 438(d), had not expired because of Congress adjournment on October 1, 1976. Assuming arguendo that TEPAC's three year practice of paying its own solicitation and administrative expenses was "inadvertent" because of a "mistaken impression" as to the proper legal interpretation, the Commission cannot agree that Re: AOR 1976-111 is a precedent for allowing NTEU's proposed reimbursement to TEPAC. TEPAC's "inadvertent" payments did not include legal fees, and they were made in 1979, 1980, and 1981 at a time when Commission regulations had been in place for several years. Moreover, the payments occurred during a period when the advisory opinion procedure, 2 U.S.C. 437f, was well established and available to clarify application of the Act or regulations to specific facts. (TEPAC itself sought advisory opinions regarding other issues on two separate occasions: AORs 1979-4 and 1979-28.)

The other opinion relied upon, Advisory Opinion 1979-33, is also distinguishable in several material respects from the instant situation. In that opinion a union's political fund paid for tickets to a labor council banquet under the erroneous factual belief that the banquet proceeds would be used for public political campaign purposes. When the union learned that the intended use of the proceeds was for a voter registration and vote campaign directed to union members and families, the union reimbursed its political fund for the cost of the tickets. Since it was a mistake of fact with reimbursement occurring within several months of the initial error, and since the initial erroneous factual information was the apparent reason why the original payment was not made, as it could have been, from union treasury funds, the Commission allowed the reimbursement. As already explained, the situation here was not merely a solitary factual mistake, but was instead an established course of considered, discretionary conduct over several years. Accordingly, the Commission concludes that a basis for allowing reimbursement is not established and that the general rule prohibiting union payments to a political fund in connection with a Federal election would preclude the proposed payment. 2 U.S.C. 441b.

This result also accords with AFL-CIO v. Federal Election Commission, 628 F. 2d 97 (D.C. Cir. 1980), cert. den., 101 S. Ct. 392 (1980), where the court reviewed loans in 1970 through 1977 that were made, and later repaid, by a labor organization's political fund (COPE-PCC) to a treasury fund (COPE Education Fund) of the same labor organization (AFL-CIO). The court held that a "breach of law by mistake" had occurred and agreed with the district court's order declaring that the transfers (repayments) from the union treasury to the political fund were in violation of 2 U.S.C. 441b. The court did, in the circumstances of that case, allow a one time transfer to clear the loan balance owed the political fund and also held that a penalty should not be assessed since the violation was not willful. It was significant to the court that the

impermissible transfers had been made for several years with no indication to the union of their impropriety. The circumstances here are quite different as the foregoing discussion indicates. Therefore, the Commission does not consider the cited decision as supportive of the conclusion desired in this opinion.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Frank P. Reiche
Chairman for the Federal Election Commission