

Executive Summary and Staff Analysis

PDC Case No. 13-011

Jay Inslee, Inslee for Washington (Inslee for Governor)

This summary highlights staff's findings, conclusions, and recommendations regarding the allegations contained in PDC Case No. 13-011, a 45-day citizen action letter (Citizen Action Complaint) filed on August 27, 2011, by Randy Pepple, campaign manager for Friends of Rob McKenna (McKenna for Governor) campaign. The Citizen Action Complaint was filed with the Washington State Attorney General's Office and the King County Prosecutor's Office, and referred to the PDC for investigation.

Allegations

The Citizen Action Complaint alleges violations of RCW 42.17 by Inslee for Washington (hereafter referred as Inslee for Governor) as follows:

1. ***Ineligible and/or Overlimit Contributions.*** That contributions received in 2009 by Inslee for Congress were not eligible for transfer to Inslee for Governor because the 2009 funds were already spent, based on applicable accounting procedures known as "First In, First Out" (FIFO)¹. Mr. Pepple cited eight examples of contributors whose money was transferred to Inslee for Governor that he alleges were ineligible because the original contribution date to Inslee for Congress, appeared to be outside of the FIFO window. Mr. Pepple alleges that the money would have already been spent and not eligible to be transferred.
2. ***Unauthorized Transfers and/or Failure to Timely Report Transfers.*** That Inslee for Governor may have failed to timely report transferred contributions from Inslee for Congress, authorizations for which were provided in July 2011. Mr. Pepple further alleged that Inslee for Governor may have transferred funds from the congressional campaign without first receiving permission from the contributors in July 2011.
3. ***Failure to Timely File Declaration of Candidacy & Financial Disclosures in January, 2011.*** That Jay Inslee became a candidate for governor in January 2011 when the Inslee for Congress committee spent \$25,570 on research consulting with the Feldman Group, and that he failed to timely file a Candidate Registration (form C-1) and a Personal Financial Affairs Statement (form F-1).

¹ Mr. Inslee's campaign refers to the transfer method as LIFO (last in, first out). Using LIFO to describe the transfer method means that the last contributions received by the original campaign are the first contributions transferred to the new campaign. This has the same meaning as PDC staff's use of the term FIFO (first in, first out) to describe the transfer method. FIFO, as used by PDC staff, means that the first contributions received by the original campaign are the first contributions spent by that campaign, and the contributions that remain for potential transfer to the new campaign are the last contributions received. Whether describing the transfer method as FIFO or LIFO, the process is the same for determining which contributions have already been "spent" and which contributions "remain" for potential transfer. Under either process, the candidate starts with the cash-on-hand balance from the original campaign, identifies the most recent contribution received, and continues identifying contributions received, in reverse order, until the amount of the cash-on-hand balance has been identified.

4. ***Failure to Timely File in April, 2011.*** In the alternative, that Jay Inslee became a candidate for governor in April 2011 when the 2012 Inslee for Congress campaign spent \$34,609 with New Partners Consulting on April 7, 2011.

Investigative Findings for Citizen Action Complaint

First Allegation: The first allegation was that eight contributions were not eligible for transfer to Inslee for Governor because the funds were previously spent and not part of the cash-on-hand balance of the 2010 Inslee for Congress campaign. Seven of the eight alleged “previously spent” contributions were alleged to have been received by the 2010 Inslee for Congress campaign in November and December 2009, and one of the contributions, \$200 from Michael Tanskley, was alleged to have been received in October 2004.² Inslee for Governor used the FIFO method of determining the contributions comprising the cash-on-hand balance, as instructed by PDC staff. All eight contributions were made within the 2010 transfer timeframe of November 12, 2009 through November 2, 2010, and all were eligible for transfer.

Second Allegation: The second allegation was that Inslee for Governor may have failed to timely report transferred contributions from Inslee for Congress, and that during July 2011 Inslee for Congress may have transferred funds to Inslee to Governor without first receiving permission from the contributors. Initially, Inslee for Governor reported contributions transferred from Inslee for Congress as a lump sum amount, as instructed by PDC staff in April 2011. After PDC staff had clarified that individual contributors were required to be itemized on C-3 reports, Inslee for Congress transferred, on August 31, 2011, funds that had been authorized for transfer during July and August. Inslee for Governor timely filed C-3 reports on September 10, 2011, reflecting the August 31, 2011 deposits. Monthly C-3 reports are due on the 10th day of the month following the month the contributions are received (in this case, transferred). This reporting requirement is not triggered by the date the transfer authorizations are received, as erroneously alleged by the complaint. A review of contribution transfer authorizations from 889 contributors for authorizations received in July and August 2011 did not reveal evidence that during July 2011 Inslee for Congress transferred funds to Inslee for Governor without first receiving permission from the contributors.

Third Allegation: The third allegation was that Jay Inslee became a candidate for governor in January 2011 when Inslee for Congress spent \$25,570 on research consulting with the Feldman Group, and that he failed to timely file a Candidate Registration (form C-1) and a Personal Financial Affairs Statement (form F-1). Inslee for Congress paid The Feldman Group to conduct a 20 minute poll, with a sample size of 600, during January 18 through 20, 2011. The cost of the polling work was \$25,570. Inslee for Congress made it clear to the Feldman Group--at the time it engaged the services--that Congressman Inslee had not made a decision to run for Governor and that the purpose of the survey was to evaluate his prospects as a candidate. Inslee for Governor stated that the results of the survey were not used as a vehicle to influence people or to promote Congressman Inslee.

² Per FEC reporting requirements, contributions less than \$200 are not required to be itemized on contribution reports. Mr. Tanskley's total contribution of \$200 was given on two dates (\$100 on January 12, 2010 and \$100 on September 25, 2010). Accordingly, since each contribution was less than \$200, neither was itemized on an FEC report.

Fourth Allegation: The fourth allegation was that, in the alternative, Jay Inslee became a candidate for governor in April 2011 when the 2012 Inslee for Congress campaign spent \$34,609 with New Partners Consulting on April 7, 2011. On February 1, 2011, Inslee for Congress entered into a Consulting Agreement with New Partners Consulting, Inc. The Agreement stated that the total fee for services would be \$32,000, payable by April, 2011. The scope of work in the Consulting Agreement included various avenues of research and analysis concerning Congressman Inslee's personal and professional affairs, such as news analysis, professional history, congressional record, campaign finance, personal financial disclosure, personal and legal records, candidate interviews, and public records research. The work was described as "Inslee Self-Research." Inslee for Governor stated that the research was to identify his own potential vulnerabilities in a 2012 campaign for congress or governor, should he decide to run for either office, and that it was not made with the intent to promote an Inslee candidacy for governor.

Under Washington law, a person becomes a candidate, subject to PDC registration and reporting requirements, when he or she "seeks nomination for election or election to public office." RCW 42.17A.005(7). That statute further provides that an individual seeks nomination or election when he or she first:

- (a) Receives contributions or makes expenditures or reserves space or facilities ***with intent to promote his or her candidacy for office;***
- (b) Announces publicly or files for office;
- (c) Purchases commercial advertising space or broadcast time to promote his or her candidacy; or
- (d) Gives his or her consent to another person to take on behalf of the individual any of the actions in (a) or (c) of this subsection. RCW 42.17A.005(7) (Emphasis added).

The Commission has adopted in rule a list of circumstances under which an individual is presumed to be a "candidate" within the meaning of the statutory definition, none of which are applicable in this case.³ The complaint in this matter alleges that Mr. Inslee became a candidate for governor several months before he publicly declared his candidacy in June, 2011, as a result of the expenditures made in January and April, 2011, allegedly to promote Mr. Inslee's gubernatorial campaign.

In interpreting the phrase "with intent to promote his or her candidacy," PDC Staff considered the common meaning of the word "promote." It is Staff's view that, in this context, to "promote" means to further the progress of a person's candidacy through publicity, so as to increase public awareness. (oxforddictionaries.com/American_english/promote).

³ The rule provides that the following circumstances give rise to a presumption that a person is a candidate:
"(1) The existence of a political committee promoting the election of such individual for public office with the knowledge and consent of that individual; or
(2) A public declaration of candidacy by an individual even if the candidacy is conditioned on a future occurrence; or
(3) Meeting the requirements set forth in WAC 390-16-230(1) or (2) [related to accepting new contributions or making new expenditures of surplus funds after an election cycle has ended, where it is presumed to be for use in a re-election campaign to the same office]." WAC 390-05-200.

The investigation revealed that the purpose of the January and April expenditures was to assist Mr. Inslee in evaluating his options (*i.e.*, whether to run for re-election to Congress or for governor), rather than to further his candidacy for either position through increasing public awareness. At the time he obtained the consulting and polling services, the evidence suggests that Mr. Inslee was exploring the feasibility of a gubernatorial campaign but had not yet made a decision about whether to become a candidate for governor.

Unlike some other jurisdictions, Washington law makes no provision for disclosing contributions and expenditures related to such exploratory activities before a person becomes a candidate. It also does not include, as some jurisdictions do, a requirement to report contributions and expenses for exploratory activities if and when a person later becomes a candidate.⁴

Conclusion and Recommendation:

Allegations 1 & 2: Transferring funds not eligible for transfer; Failure to timely report receipt of transfers; and Transferring funds without authorization. It was found that the eight contributions identified as not eligible for transfer were made within the 2010 transfer timeframe of November 12, 2009 through November 2, 2010, and all were eligible for transfer. Inslee for Governor timely reported transfers it received from Inslee for Congress. No evidence was found that during July 2011 Inslee for Congress transferred funds to Inslee to Governor without first receiving permission from the contributors. For these reasons, staff recommends that allegations #1 and #2 be dismissed and recommend to the King County Prosecuting Attorney that no further action be taken.

Allegations 3 & 4: Failure to timely register a candidacy for governor. In applying the law to the facts revealed through our investigation, staff concluded that Mr. Inslee was not a candidate for governor subject to PDC registration and reporting requirements in January or April, 2011, as alleged by the complaint. For this reason, staff recommends that the Commission dismiss allegations #3 and #4 and recommend to the King County Prosecuting Attorney that no further action be taken.⁵

⁴ For example, the Federal Election Commission's Candidate Registration Brochure advises that: "...financial records of testing-the-waters activities should be kept because, if the individual later becomes a candidate, the funds received and spent to test the waters will be considered contributions and expenditures. They will be reportable when the campaign files its first report. 11 CFR 100.72(a); 100.131(a); 101(3)." Similarly, the California Fair Political Practices Commission has advised: "If an individual ultimately decides to become a candidate, payments in connection with the exploratory activity would then be disclosed. (*Powell* Advice Letter, No. A-85-241)." *Nutting* Advice Letter, No I-01-096.

⁵ Specifically, Staff found no evidence of alleged violations of RCW 42.17A.205 (previously RCW 42.17.040), the requirement to timely file declaration of candidacy; RCW 42.17A.700 (previously RCW 42.17.240), the requirement to timely file a financial disclosure report; RCW 42.17A.405(12) (previously RCW 42.17.640), providing that no political committee that has not received contributions of ten dollars or more from at least ten person registered to vote in Washington during the previous 180 days may make a contribution to a state office candidate; or RCW 42.17A.490(2) (previously 42.17.790), providing that funds contributed to a candidate's campaign may not be used to campaign for another office without the approval of the contributor.