



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Benishek for Congress, et al.) MUR 6421

STATEMENT OF REASONS
OF CHAIR ELLEN L. WEINTRAUB
AND COMMISSIONER STEVEN T. WALTHER

This represents the first matter made public in which the Commission has been tasked with enforcing the travel provisions of the Honest Leadership and Open Government Act of 2007 (“HLOGA”).¹ HLOGA and Commission regulations prohibit House candidates and their authorized committees or leadership PACs from making expenditures for non-commercial aircraft travel in connection with a federal election.² Dan Benishek, a candidate for Michigan’s 1st Congressional District, admitted to violating HLOGA.³ After conducting an investigation into the cost of the flight, the Office of General Counsel (“OGC”) recommended that the Commission take no further action other than to send letters of caution to respondents regarding the prohibition on non-commercial aircraft flight by a House candidate.⁴ OGC based its conclusion on the

¹ 2 U.S.C. § 439a(c)(2). HLOGA, which became effective on September 14, 2007, revised the Federal Election Campaign Act of 1971, as amended (“the Act”). The Commission promulgated implementing regulations which became effective on January 6, 2010. See Explanation and Justification, 74 Fed. Reg. 63951 (Dec. 7, 2009), available at http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-27.pdf.

² *Id.* The Commission’s regulations provide that House candidates are prohibited from campaigning using non-commercial air travel, 11 C.F.R. § 100.93(e)(2), and from making an expenditure for accepting in-kind contributions in the form of such travel. 11 C.F.R. § 113.5(b). The prohibition applies to “any [House] candidate traveling in connection with an election for Federal office” 11 C.F.R. § 100.93(a)(3)(i)(A). There are two exceptions to the ban on non-commercial aircraft travel by House candidates that are not relevant here: travel on government-operated aircraft and aircraft owned by the candidate or members of the candidate’s immediate family. See 11 C.F.R. §§ 100.93(e) and (g), 113.5(b)(2) and (c).

³ In response to the Commission’s June 2011 reason to believe findings, Dan Benishek and his principal campaign committee, Benishek for Congress admitted that Benishek took two non-commercial flights – one of which was strictly for campaign purposes. Letter from Charles R. Spies, Counsel for Benishek Respondents, to Elena Paoli, Staff Attorney, FEC, July 7, 2011; Joseph A. Shubat Affidavit ¶ 4.a.

⁴ See Second General Counsel’s Report at 2.

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low dollar amount of the fair market value of the flight at issue.⁵ We could not support this recommendation and instead voted to direct OGC to enter into conciliation.⁶ The cost of the flight is not relevant to enforcement of HLOGA. The Act is clear that if a House candidate accepts such a flight for campaign purposes, the candidate and his or her authorized committee violate the law.

On April 10, 2010, Benishek took a flight on a non-commercial, corporate-owned airplane for campaign travel to the Munising Home Show.⁷ About six months after the flight, the Benishek Committee attempted to cure the violation by paying \$2,250 to the owner of the airplane to pay for the flight.⁸ On June 14, 2011, the Commission voted unanimously to find reason to believe that Benishek violated HLOGA by taking a prohibited non-commercial flight, as well as the prohibition on accepting corporate contributions, and authorized OGC to investigate the cost of the flight.⁹ The investigation revealed that the Committee's payment attempting to cure the violation exceeded the cost of a comparable flight.¹⁰ It was the results of this investigation that prompted OGC to make the recommendation that it did.

Before HLOGA, candidates were permitted to take non-commercial flights as long as they paid the rates set by existing travel rules.¹¹ Indeed, the entire purpose of this provision of HLOGA is to prohibit non-commercial air travel *entirely* for House candidates; payment cannot cure the violation. The members of the U.S. House of Representatives – all having been candidates themselves – were well aware of the practical ramifications of HLOGA when Congress voted to enact the law. Section 439a(c)(2) would be rendered meaningless if the Commission were to excuse HLOGA

⁵ See Second General Counsel's Report at 9.

⁶ This motion failed by a vote of 2-3; Commissioners Hunter, McGahn, and Petersen voted against. See Certification in MUR 6421, dated February 7, 2013. After that vote failed, rather than vote to close the file, Commissioner Walther ultimately joined Commissioners Hunter, McGahn, and Petersen to vote for no further action so that OGC would be authorized to send a letter cautioning respondents to take steps to ensure that their conduct is in compliance with the Act and the Commission's regulations. His view was that, if the vote to close the file had passed, there would have not have been a letter of caution issued to the respondents.

⁷ Benishek flew from Harbor Springs, Michigan to Gwinn, Michigan to attend the Munising Home Show, where he engaged in campaign activity, greeting attendees and speaking to them about his positions on current issues. Letter from Charles R. Spales, Counsel for Benishek Respondents, to Elena Paoli, Staff Attorney, FEC, July 21, 2011 at 2; Subpart Affidavit ¶ 4.a.

⁸ See Second General Counsel's Report at 3.

⁹ 2 U.S.C. §§ 439a(c)(2) and 441b; Certification in MUR 6421, dated June 16, 2011.

¹⁰ OGC concluded that, at most, the Munising flight cost roughly \$885. See *id.* at 3-5.

¹¹ Under the 2003 travel rules, the payment required for non-commercial air travel varied among the first-class, coach, or charter rate, depending on whether the travel occurred between cities served by regularly scheduled commercial airline service, and whether that service was available at a first-class rate. See 11 CFR 100.93(a)(3)(i) and (c) (2004).

violations in cases where candidates or their committees make post hoc payments.
Accordingly, we believe a penalty was warranted here.

Date 3/5/13

Ellen L. Weintraub

Ellen L. Weintraub
Chair

Date 3/5/13

Steven T. Walther

Steven T. Walther
Commissioner