

ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

PAUL A. RENNE
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VICE-CHAIRPERSON

BEVERLY HAYON
COMMISSIONER

BENEDICT Y. HUR
COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROCK
EXECUTIVE DIRECTOR

July 8, 2015

Juma Byrd
Senior Collection Officer
Bureau of Delinquent Revenue
Office of the Treasurer and Tax Collector
City Hall, Room 140
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

**RE: Referral of Forfeitures Due From 2010 Election to the San Francisco Bureau
of Delinquent Revenues (BDR) - Mark Farrell for Supervisor 2010
ID # 1320480**

Dear Mr. Byrd:

By letter dated December 9, 2014, the San Francisco Ethics Commission notified Supervisor Mark Farrell of the Commission's decision to require the Mark Farrell for Supervisor 2010 Committee to forfeit \$190,903.04 in contributions. As of July 3, 2015, the forfeiture fees remain unpaid

The Ethics Commission is today referring Supervisor Mark Farrell of the Mark Farrell for District 2 Supervisor 2010 Committee to Bureau of Delinquent Revenue for unpaid campaign forfeitures payable to San Francisco City and County in the amount of \$190,903.04 pursuant to SF C&GCC Section 1.114(f) for exceeding campaign contribution limits, for which Supervisor Mark Farrell is personally liable.

If you have questions please contact Ernestine Braxton, Fines Collection Officer at (415) 252-3110.

Sincerely,

A handwritten signature in cursive script that reads "Ernestine Braxton".

Ernestine Braxton
Fines Collection Officer
Ethics Commission

Attached: BDR Warning Letter dated June 15, 2015 sent to James R. Sutton, Sutton
Law Firm
Forfeiture Notice Dated December 9, 2014



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EXECUTIVE DIRECTOR

June 15, 2015

Supervisor Mark Farrell
c/o James R. Sutton
The Sutton Law Firm
150 Post Street, Suite 405
San Francisco, CA 94108

**RE: Referral of Forfeitures Due from 2010 Election to the San Francisco Bureau
of Delinquent Revenues (BDR) – Mark Farrell for Supervisor 2010
ID # 1320480**

Dear Supervisor Farrell:

Per the instructions of the Ethics Commissioners, your request for waiver of forfeiture dated March 15, 2015 has been denied.

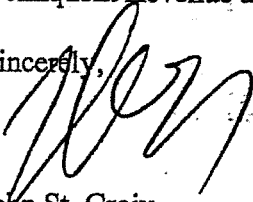
By letter dated December 9, 2014, Supervisor Mark Farrell was notified of the Commission's decision to require the Committee, Mark Farrell for Supervisor 2010, to forfeit \$190,903.04 in contributions. As of June 15, 2015, the forfeiture fees remain unpaid.

Consequently, we are referring your forfeiture fees in the amount of \$190,903.04, to Bureau of Delinquent Revenue. The referral is effective on Monday, July 6, 2015.

If you wish to pay your \$190,903.04 in fees before the referral is effective, please make sure that payment is received by the Ethics Commission on or before Thursday, July 2, 2015 by submitting a check payable to the City & County of San Francisco complete with your committee's name and FPPC ID; or making your payment online by clicking on the Payments Link on the Ethics Commission's Home Page at www.sfethics.org

If you have questions on or before the Thursday, July 2, 2015 deadline, please contact Ernestine Braxton, Fines Collection Officer at (415) 252-3110. After July 6, please contact the Bureau of Delinquent Revenue at the Office of the Treasurer and Tax Collector at 554-4457.

Sincerely,



John St. Croix
Executive Director



ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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COMMISSIONER

PETER KEANE
COMMISSIONER

JOHN ST. CROIX
EXECUTIVE DIRECTOR

Via U.S. Mail

December 9, 2014

Supervisor Mark Farrell
c/o James Sutton
150 Post Street, Suite 405
San Francisco, CA 94108

RE: Forfeitures due from 2010 election

Dear Supervisor Farrell:

I am writing to you regarding forfeitures that have not yet been paid relating to the 2010 election.

On November 20, 2014, the Fair Political Practices Commission ("FPPC") approved a Stipulation between its staff and Common Sense Voters, Vote for Mark Farrell for Supervisor 2010 ("CSV") and Christopher Lee. In 2009, you created the Mark Farrell for District 2 Supervisor 2010 committee and retained Chris Lee as your committee's campaign consultant. The FPPC found that Mr. Lee coordinated with CSV, its principal officer, and its campaign consultant regarding the setup, fundraising, and initial campaign planning of CSV. The FPPC found that Mr. Lee's interactions caused CSV to become your candidate-controlled committee.

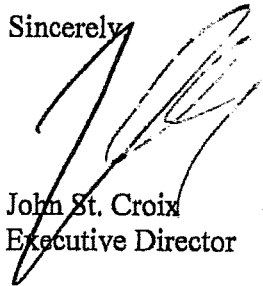
As CSV was a candidate-controlled committee, it was subject to the \$500 contribution limits in section 1.114 of the San Francisco Campaign and Governmental Conduct Code ("SF C&GCC"). In addition, CSV's expenditures were not considered independent and have been treated as contributions to you from the persons making the expenditures to the candidate on whose behalf, or for whose benefit the expenditures are made, in accordance with section 1.115 of SF C&GCC. Pursuant to section 1.114(f) of SF C&GCC, each committee that receives a contribution which exceeds the limits "shall pay promptly the amount received...in excess of the amount permitted by this Section to the City and County of San Francisco and deliver the payment to the Ethics Commission for deposit in the General Fund of the City and County."

According to CSV's filings, CSV made \$43,399.18 in expenditures in your support and \$148,003.86 in expenditures against other candidates for Supervisor of District 2, for a total of \$191,403.04. As stated above, these expenditures are not considered independent and have been treated as contributions to you. Of the \$191,403.04 spent on your behalf and for your benefit during the 2010 election, \$190,903.04 exceeded the \$500 contribution limit in SF C&GCC section 1.114. Therefore, pursuant to section

1.114(f), you are required to forfeit \$190,903.04 to the City and County of San Francisco and deliver the payment to the Ethics Commission for deposit in the General Fund of the City and County. The Ethics Commission may provide a waiver or reduction of the forfeiture.

If you have any questions or wish to discuss this letter, please feel free to contact me at 415-252-3100.

Sincerely,



John St. Croix
Executive Director

THE SUTTON LAW FIRM

November 4, 2015

VIA E-MAIL & PERSONAL DELIVERY

Stephanie M. Profitt, Esq.
Office of the Treasurer & Tax Collector
1 Dr. Carlton B. Goodlett Pl., Rm. 140
San Francisco, CA 94102

RE: Demand for "Forfeiture" From Supervisor Mark Farrell

Dear Ms. Profitt:

This letter responds to your September 30, 2015 letter requesting that our client, Supervisor Mark Farrell, pay \$190,903.04 to the Office of the Treasurer & Tax Collector stemming from a "forfeiture" demand made earlier this year by the Ethics Commission ("SFEC"). Supervisor Farrell wanted us to emphasize at the outset that he takes this matter very seriously and will of course fully cooperate with your office to bring this matter to a resolution, while at the same time strongly disagreeing with the underlying basis for the request. This letter explains why the request has no merit; we will follow up this letter to set up a time to meet in person to talk through these factual and legal issues.

Factual Background

The amount the City is demanding that Supervisor Farrell "forfeit" to the City was actually never received or spent by him or by his 2010 campaign committee ("Farrell Committee"). Instead, this amount was raised and spent by a political committee named "Common Sense Voters" ("CSV") which independently produced and disseminated mail pieces in mid-October 2010 supporting then-candidate Farrell's candidacy for District Two Supervisor.¹

Immediately following the election, Janet Reilly, Supervisor Farrell's opponent in the race, sent a complaint to the SFEC and the California Fair Political Practices Commission

¹Please note that CSV raised and spent these funds during the 2010 election cycle, when Supervisor Farrell first ran for office. The SFEC began its action against Supervisor Farrell over four years later, a month after his re-election in 2014. (CSV did not participate in the 2014 election.)

Stephanie M. Profitt, Esq.
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("FPPC"), the state agency charged with enforcing the state's campaign finance laws, alleging, among other things, that CSV had improperly coordinated its activities with the Farrell Committee. (12/23/10 letter from Chuck Bell to John St. Croix et. al; copy attached.) The FPPC opened an investigation into the activities of CSV and the Farrell Committee immediately thereafter, focusing on whether CSV had coordinated with the Farrell Committee's campaign manager, Chris Lee. After an extensive investigation spanning over three years, which included interviews of Supervisor Farrell, Mr. Lee, others who worked on his campaign, and several people involved with CSV, and the review of hundreds of e-mails produced by Supervisor Farrell and others, the FPPC found that CSV and Mr. Lee had violated the law and levied a \$14,500 fine – and completely exonerated Supervisor Farrell and the Farrell Committee of any wrongdoing. The FPPC stipulation explicitly found that, "The evidence supports the finding that Mark Farrell did not authorize Respondent Lee, as an agent of the Farrell Committee, to coordinate with Respondent CSV." (In the Matter of Common Sense Voters, SF 2010 and Chris Lee (11/20/14) FPPC No. 10/973; copy attached.²)

SFEC staff was involved in every step of the FPPC's investigation. They participated in some of the interviews (some of which were even held in the SFEC's office), had full access to all of the e-mails and other information gathered by the FPPC, and communicated regularly with the FPPC about its findings. After being appraised of the results of the investigation in mid-2014, SFEC staff agreed with the FPPC's conclusion to only fine CSV and Mr. Lee, and formally informed the FPPC that they would not take any action against Supervisor Farrell or the Farrell Committee. No subsequent investigations, findings of fact or legal analysis by the SFEC or any other City agency contradict the conclusions of the FPPC's investigation.

Despite the decision to not proceed with any investigation or penalty (and even though the four-year statute of limitations under the City's campaign law had lapsed, as discussed below), the SFEC inexplicably sent Supervisor Farrell a letter on December 9, 2014 demanding that he personally "forfeit" to the City the money that was raised and spent by CSV. We requested a waiver of this forfeiture request and met with SFEC staff to explain that forfeiture was inappropriate and legally barred. Former SFEC Executive Director John St.

²There is a reason why the FPPC went out of its way to exonerate Supervisor Farrell: because he did nothing wrong. He never spoke with any of the people involved with CSV; he had no idea what CSV was doing until its mailers showed up in mail boxes in the District; and he had no idea that his campaign manager had interactions with the people behind CSV, and certainly did not authorize him to do so.

Stéphanie M. Profitt, Esq.
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Croix ultimately granted the request and completely waived the forfeiture demand, for several reasons: (1) because the City was legally barred by the statute of limitations from taking any action after October 2014; (2) because Supervisor Farrell was “not named as a respondent in the [FPPC] stipulation”; and (3) because “the Commission does not have any evidence before it that you committed an act of fraud.” (6/5/15 letter from St. Croix to Supervisor Farrell; copy attached.) This letter – which supports our position that the forfeiture demand has no legal or factual basis – is the only written document produced by the City about the merits of this matter. Nevertheless, and even though City law explicitly grants the SFEC Executive Director sole discretion to determine whether to grant or deny forfeiture waiver requests (S.F. Camp. & Govt. Conduct Code section 1.168(c)(4)³), the Commissioners later instructed Mr. St. Croix to withdraw his waiver grant. (6/15/15 letter from St. Croix to Supervisor Farrell; copy attached.)

We then attempted to engage the Commissioners to determine the basis for this action, but were rebuffed at every point. In fact, the Commissioners have never provided us or Supervisor Farrell with any written or even verbal basis for re-instating the forfeiture demand. We submitted letters to the Commission (12/16/14 letter to Chair Ben Hur; 3/15/15 letter to Chair Hur; 3/15/15 letter to St. Croix; 6/4/15 letter to Paul Renne; copies attached) and made presentations at the SFEC’s April 27, 2015 and June 5, 2015 meetings – but the Commissioners never responded to our arguments; never explained why they overturned the Executive Director’s grant of the waiver request; never explained why the statute of limitations did not bar their action; never explained how they could ask someone who had never received any funds to forfeit them to the City; and never issued any findings of fact or conclusions of law.

Request

For the reasons set forth herein, the amount requested is uncollectible and we ask that your office cease its collection attempt and immediately close this matter.

³Unless otherwise noted, all further citations are to the San Francisco Campaign and Governmental Conduct Code.

Legal Analysis

1. Forfeiture is barred by the statute of limitations.

The forfeiture is unwarranted, as a matter of law, because of the four-year statute of limitations in the City's campaign law. (Section 1.168(c)(3); see also SFEC Forfeiture Policy, found in 3/4/08 SFEC staff memorandum regarding "Ethics Commission Policy Changes" at p.1 ["Statute of limitations regarding late fines and forfeitures – the legal limitations period is four years."]; copy attached.⁴) The four-year statute in this matter has long passed. The activities which form the basis for the request (Mr. Lee's e-mails to CSV and CSV's mailers) took place in October 2010, over four years before the SFEC sent the forfeiture letter in December 2014. If the City wanted to pursue forfeiture or any other enforcement action against Supervisor Farrell or the Farrell Committee, it therefore was legally required to act by October 2014. It did not do so, so is now legally barred from requesting forfeiture.

The question is simply whether the City was made aware of the possibility that CSV and/or the Farrell Committee had violated the law in sufficient time to open an investigation, research the facts, and file charges by October 2014. It clearly was. The original complaint letter sent in December 2010 made the City aware of possible violations, by very specifically alleging an "overlap between the Farrell candidate-controlled committee and [CSV]" and "possible involvement of Mark Farrell . . . in coordinating with [CSV] in the making of independent expenditures." The FPPC copied the SFEC on its letter to the complainant in January 2011; the SFEC informed the complainant that the FPPC would take the lead on the

⁴The Forfeiture Policy also states that the Commission will not pursue forfeiture unless staff has delivered a notice to the political committee within one year from the date that the applicable campaign report is due: "If the Commission fails to send a [forfeiture assessment notice] to a committee assessing a forfeiture within one year of the filing deadline or the date that the defective report was received by the Commission, the Commission will not seek forfeiture." (8/12/08 SFEC staff memorandum regarding "New Policies and Procedures" at p. 3; copy attached.) The Forfeiture Policy underscores the importance of the City acting in a timely manner, stating that "the Commission has an obligation to let candidates and committees know that "the clock is ticking" at the earliest possible occasion." (3/4/08 SFEC staff memorandum at p. 1.) The forfeiture demands to Supervisor Farrell of course arrived years after CSV and the Farrell Committee filed their campaign reports, well beyond this one-year rule (as well as beyond the four-year statute of limitations).

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investigation and that the SFEC would monitor; the SFEC participated in the FPPC interviews of several people involved with the two committees in 2012; and the SFEC and FPPC spoke about the matter throughout 2013 and 2014. There was no reason why the City could not have reached its own conclusions and levied its own fine by October 2014.

In short, the City's failure to act by October 2014 bars the Tax Collector from seeking forfeiture from Supervisor Farrell at this time.

2. Neither Supervisor Farrell nor the Farrell Committee ever received any funds which they could now "forfeit" to the City.

Inherent in the legal concept of "forfeiture" is the notion that the person forfeiting the property actually obtained possession of the property at some point. (See, e.g., U.S. v. Bajakajian (1998) 524 U.S. 321.) In fact, the forfeiture provision in the City's campaign law, by its own wording, only applies to situations in which a political committee actually receives money that does not comply with the law. (Section 1.114(e) ["each committee that receives a contribution which exceeds the limits imposed by this Section . . . shall pay promptly the amount received or deposited in excess of the amount permitted by this Section to the City . . ."]; emphasis added.) Nothing in this provision supports the position that forfeiture can apply to money spent by one political committee which never makes it into the other committee's bank account. According to SFEC records, it has issued approximately 100 forfeiture letters since the provision went into effect; every one of these committees actually received and deposited the funds in question.

The Farrell Committee was closed in March 2013. It has not existed for over two years, and of course has no funds to forfeit. Moreover, while in existence, the Farrell Committee never received any of the money that the City is now attempting to seize. Suggesting that a political committee must now "forfeit" money to the City which it did not raise, receive, spend, or in any way control defies all logic.

To the extent that the City is demanding that Supervisor Farrell use his personal funds for this amount, this suggestion is even more absurd. Under no stretch of the law or facts did Supervisor Farrell ever receive any of the money in dispute, which would be a legal prerequisite for demanding that he now has to forfeit the funds to the City. The City is asking Supervisor Farrell to do the impossible: hand over to the City something he never had in the first place. Moreover, the forfeiture provision by its own terms only applies to "committees" which receive campaign funds, so the City has no legal basis to demand that he use his

personal funds for this amount. In short, the forfeiture request is both nonsensical and not supported by the law.

3. Supervisor Farrell and the Farrell Committee are inappropriate respondents.

The FPPC stipulation only involved CSV and Mr. Lee. And the FPPC determined that Supervisor Farrell and the Farrell Committee did nothing wrong. The City is nevertheless now pursuing money from Supervisor Farrell, not from CSV, the political committee which actually raised and spent the money in question. If the City believes that the \$191,000 was somehow raised or spent improperly and that the person or persons who raised and spent this money should be required to pay a fine or turn this amount over to the City, then it should contact that person or persons. In any case, it is certainly not appropriate to attempt to penalize someone who had absolutely nothing to do with CSV's activities.

4. The City has no legal basis to request forfeiture.

Neither the SFEC nor any other City agency has followed the procedures required before the government may seek a monetary penalty from a citizen. The SFEC never opened its own investigation into the matter (as required by Charter section 3.699-13(a) and SFEC Regulations for Investigations and Enforcement Proceedings section V), never presented Supervisor Farrell with a Probable Cause Report or other written explanation of the evidence and law (as required by Charter section 3.699-13(b) and SFEC Enforcement Regulations section VII), and never held a hearing to review the facts and evidence (as required by Charter section 3.699-13(c) and SFEC Enforcement Regulations sections VIII-XII).⁵ This forfeiture demand therefore violates every concept of due process and fair government. In contrast, the FPPC followed all legal requirements for governmental investigations and enforcement matters (see Cal. Govt. Code sections 83115 et. seq., Cal. Govt. Code sections 91000 et. seq. & 2 Cal. Code of Reg. sections 18360 et. seq.) – and, after a full investigation, in a formal, written decision approved unanimously by the full Commission stated clearly that Supervisor Farrell did not violate the law.

⁵Not only did the SFEC not follow its own enforcement regulations, but the appropriate result of such an investigation, should it have concluded that a violation occurred, would have been an administrative penalty levied pursuant to the enforcement procedures of City law (i.e., a monetary fine), not a conclusory demand that a sitting Supervisor or a defunct political committee somehow pay hundreds of thousands of dollars to the City.

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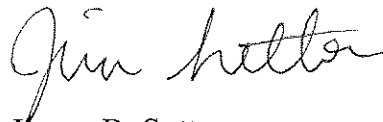
Conclusion

In sum, the City has no basis – legal or otherwise – to demand any payment from Supervisor Farrell or the Farrell Committee at this time. An exhaustive investigation by the FPPC specifically concluded that Supervisor Farrell did nothing wrong, and there has never been any type of administrative or civil proceeding which concluded that Supervisor Farrell violated any law. The action by the SFEC and any action by your office is completely barred by the statute of limitations, and the forfeiture demand is not supported by any findings of fact or conclusions of law. We therefore request a dismissal of the September 30, 2015 letter issued by your office demanding \$190,903.04 and ask that the City formally close this matter.

* * *

Please let us know if you have any additional questions or if you would like any other documentation related to this matter.

Sincerely,



James R. Sutton

cc: Supervisor Mark Farrell
Attachments
MCA/lc
#1440.02