



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 20, 1991

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-13

Richard E. Casagrande  
New York State Public Employees Federation, AFL-CIO  
1168-70 Troy-Schenectady Road  
P.O. Box 12414  
Albany, NY 12212-2414

Dear Mr. Casagrande:

This responds to your letter of November 6, 1989, as supplemented by your letter of April 1, 1991, requesting an advisory opinion on behalf of the New York State Public Employees Federation AFL-CIO ("PEF") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the affiliation of a separate segregated fund you are proposing to form with the separate segregated funds of the two unions that jointly established PEF.

You state that PEF was formed through the cooperation of two international unions, the American Federation of Teachers ("AFT") and the Service Employees International Union ("SEIU") to provide for "an independent bargaining unit for professional, scientific and technical employees of New York and to allow those individual employees membership in both AFT and SEIU." You also state that PEF is a local unit of both AFT and SEIU and has the same rights and responsibilities as other locals. You further indicate that all PEF members automatically become members of either AFT or SEIU, depending on their job classification, but are entitled to all of the benefits of both unions except for certain death and injury benefits.

You have provided the Commission with a copy of the Affiliation Agreement signed by AFT, SEIU, and PEF. The Affiliation Agreement, which states that PEF will be affiliated with AFT, SEIU, and the New York State United Teachers ("NYSUT"), will remain in effect unless it is terminated by AFT and SEIU. The Agreement provides that PEF's Constitution and Bylaws are subordinate to the Constitution and Bylaws of AFT and SEIU and that PEF's Constitution and Bylaws cannot be amended without AFT's and SEIU's approval. The Agreement also provides

for a permanent Affiliates Advisory Committee, composed of one representative chosen by AFT and one representative chosen by SEIU, to act as a liaison between PEF and AFT and SEIU and to make recommendations to PEF. PEF is also required to report the status of its collective bargaining negotiations and administration of contracts to both AFT and SEIU and to provide AFT and SEIU with annual financial audits and other information requested by AFT and SEIU. The Agreement further provides that AFT and SEIU may appoint a trustee to control PEF's affairs to carry out the Affiliation Agreement or the Constitution and Bylaws of AFT and SEIU. While PEF can appeal the decision to appoint a trustee, the final decision remains with AFT and SEIU. In addition, the Affiliation Agreement gives AFT and SEIU the power to revoke, terminate, or suspend PEF's charter.

Currently, AFT, SEIU, and PEF each have a separate segregated fund ("SSF"), named AFT-COPE, SEIU-COPE, and PEF-COPE<sup>1</sup> respectively. PEF-COPE(I) has identified SEIU-COPE and NYSUT VOTE/COPE<sup>2</sup> as affiliated committees in its Statement of Organization filed with the Commission and has reported a transfer to AFT-COPE and a transfer to SEIU-COPE as transfers to affiliated committees.

You assert that PEF wants to establish a new SSF which is not affiliated with any other committee. You also assert that PEF-COPE(II) would not be affiliated with either AFT-COPE or SEIU-COPE because "none of these committees has the power or ability to control or direct the nature of political contributions made by the other committees," and there is "no coordination, discussions or pre-arrangements between the political committees or their connected organizations with respect to the making of political contributions." You assume, however, that PEF members will be eligible to contribute to or otherwise participate in the activities of all three SSFs. You ask whether under the Act and regulations, PEF-COPE(II) will be considered to be affiliated with AFT-COPE and SEIU-COPE, and if so, how the contribution limits of the Act should be shared between PEF-COPE(II) and AFT-COPE and PEF-COPE(II) and SEIU-COPE.

The Act and Commission regulations treat the committees established by the same labor organization or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof as a single committee. 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a)(1)(ii). See 11 CFR 100.5(g)(2) The regulations provide that the Commission may examine specific factors in the context of the overall relationship between organizations to determine whether such factors are evidence of affiliation between organizations. 11 CFR 100.5(g)(4) and 110.3(a)(3)(ii). These factors include but are not limited to:

- (1) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- (2) Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decisionmaking employees or members of another sponsoring organization or committee;

(3) Whether a sponsoring organization or committee has a common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(4) Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(5) Whether a sponsoring organization or committee provides funds or goods in a significant amount or an ongoing basis to another sponsoring organization or committee, such as through direct or indirect payments for administrative, fundraising, or other costs; and

(6) Whether a sponsoring organization or committee or its agent had an active or significant role in the formation of another sponsoring organization or committee. 11 CFR 100.5(g)(4)(ii)(B), (C), (D), (E), (G), and (I); 11 CFR 110.3(a)(3)(ii)(B), (C), (D), (E), (G), and (I).

The issue of whether the SSF of a union that is a local unit of two distinct international unions is affiliated with the SSFs of the international unions presents an issue of first impression for the Commission. The facts of this advisory opinion request are, however, analogous to two corporations forming a joint venture. The Commission has on several occasions considered the application of the affiliation regulations to a joint venture situation. See Advisory Opinions 1987-34, 1984-36, and 1981-54. In these opinions, the Commission has considered whether the noncorporate entity formed from the joint venture, and its corporate subsidiaries, are affiliated with one or both of the corporate entities based on the factors in 11 CFR 100.5(g)(4)(ii) and 11 CFR 110.3(a)(3)(ii), and the Commission has in some instances found affiliation. For example, in Advisory Opinion 1987-34, the Commission found that a corporation that was wholly owned by a joint venture partnership of two corporations was affiliated with both corporations because the joint venture partnership was equally owned and controlled by both corporations. The facts of Advisory Opinion 1987-34 are analogous to the facts of this Advisory Opinion Request.

AFT and SEIU jointly established PEF to serve "as the appropriate bargaining unit of professional, scientific, and technical employees in the state of New York." The Affiliation Agreement signed by PEF, AFT, and SEIU explicitly notes that PEF was "jointly created and jointly financed" by AFT and SEIU. The Affiliation Agreement contains numerous provisions, some of which are discussed below, that provide for AFT's and SEIU's continuing authority over the structure and operation of PEF. The Affiliation Agreement will remain in effect unless it is terminated by AFT and SEIU.

PEF has an overlapping membership with AFT and SEIU. PEF is a local unit of both AFT and SEIU and its members therefore also "hold membership in" either AFT or SEIU, depending on the job classification of the particular PEF member. All PEF members are entitled to most of the benefits of membership in both AFT and SEIU, regardless of which union they belong to.

As members of either AFT or SEIU, PEF members can serve as delegates to their international union's convention. Furthermore, the 5 statewide delegates elected by the PEF membership attend both the AFT and SEIU conventions. In addition, both the President and Secretary/Treasurer of PEF are eligible to sit on the Boards of both AFT and SEIU. Currently, the President of PEF is a member of SEIU's Executive Board.

AFT and SEIU maintain substantial ability to control PEF because, under the Affiliation Agreement, PEF's Constitution and Bylaws are subordinate to the Constitution and Bylaws of AFT and SEIU, and cannot be amended without the approval of AFT and SEIU. In addition, the Affiliation Agreement provides that certain matters are not subject to referendum, which is the highest level of governance of PEF. These matters include employment, assignment, promotion, discharge or compensation of PEF staff, the amount and payment of PEF members' dues to AFT and SEIU, and the amendment or interpretation of the Affiliation Agreement.

AFT and SEIU implemented procedures to insure that they would continue to maintain control over PEF. The Affiliation Agreement creates a permanent Affiliates Advisory Committee, composed of one representative of AFT and one representative of SEIU, to act as a liaison between PEF and AFT and SEIU and to make recommendations to PEF. PEF's Constitution and Bylaws explicitly note the establishment of this committee and further note that the committee's purpose is to "insure that the interdependent relationship among PEF, AFT and SEIU is maintained and continued."

In addition, AFT and SEIU have the ability to appoint a Trustee "to take charge and control the affairs of PEF" to carry out the Affiliation Agreement or the Constitution and Bylaws of AFT and SEIU. The trustee, who is subject to the supervision and direction of AFT and SEIU, would supplant PEF's ability to govern itself until such time as the trustee restores PEF's self government. Although PEF can appeal the decision to appoint a trustee, the final decision remains with AFT and SEIU. Furthermore, AFT and SEIU have the power to revoke, terminate, or suspend PEF's charter.

AFT and SEIU also retain some control over the amount of dues PEF collects from its members. Although PEF's Constitution and Bylaws allow PEF to set its own dues, the Affiliation Agreement specifically provides that AFT and SEIU must approve the minimum amount of dues. AFT and SEIU can therefore reject the amount of dues set by PEF's members at its convention, and insist that a higher amount be set.

PEF members are also required to pay dues to the international unions. However, PEF, rather than the members of PEF themselves, is responsible for the collection and payment of its members' dues to AFT and SEIU. PEF forwards these dues out of the dues it receives from its members by calculating the average PEF membership for the month and then paying dues to AFT based on one half of that number and to SEIU based on one half of that number, regardless of the actual number of PEF members who are members of AFT and SEIU respectively.

PEF's ongoing relationship with AFT and SEIU is also maintained through provisions in the Affiliation Agreement which require PEF to report the status of its collective bargaining negotiations and administration of contracts to AFT and SEIU and to provide AFT and SEIU

with annual financial audits. AFT and SEIU also have the authority to request additional financial information, audits, books, records or other documents. These provisions allow AFT and SEIU to monitor PEF, and may provide the basis for the recommendations of the Affiliates Advisory Committee to PEF, the appointment of a trustee, or the revocation, suspension, or termination of PEF's charter.

Thus, based on these facts, the Commission concludes that PEF-COPE (II) would be affiliated with both AFT-COPE and SEIU-COPE and their affiliates<sup>3</sup>. Even though you assert that AFT and SEIU would not be involved in PEF-COPE contribution activity, the significant level of their involvement in other PEF functions and the "interdependent" relationship between these unions warrants this conclusion. See Advisory Opinion 1985-6. Based on the facts presented in your request, AFT-COPE and SEIU-COPE would not be affiliated with each other.

Because PEF-COPE(II) would be affiliated with AFT-COPE and SEIU-COPE, both of which are multicandidate committees, PEF-COPE(II) would immediately qualify as a multicandidate committee. See, Advisory Opinions 1986-42 and 1980-40. As a multicandidate committee, PEF-COPE(II) can contribute up to \$5000 to a candidate, as long as its contributions, when aggregated with those made by its affiliated committees, do not exceed \$5000 per candidate, per election. 11 CFR 110.2(b), 11 CFR 110.3(a)(1).

You also ask how the contribution limits should be shared between PEF-COPE(II) and AFT-COPE, and between PEF-COPE(II) and SEIU-COPE. As noted above, PEF is analogous to a joint venture partnership between two corporations, where both corporations have equal ownership and control. After applying the Commission's analysis in this type of situation to PEF-COPE(II), the Commission concludes that, for contribution limit purposes, each PEF-COPE(II) contribution should be apportioned half to the limit shared with AFT-COPE and half to the separate limit shared with SEIU-COPE. See, Advisory Opinion 1987-34. For example, if PEF-COPE(II) made a \$500 contribution to Federal candidate X, \$250 of the contribution would count toward the limit shared with AFT-COPE and \$250 would count toward the limit shared with SEIU-COPE.

Of course, these apportioned contributions are only permitted to the extent that no committee exceeds the aggregate 2 U.S.C. 441a(a) limits. So, if for example, AFT-COPE had previously made a \$5000 contribution to Federal Candidate Y, PEF-COPE(II) could not make a contribution to Candidate Y because when PEF-COPE(II)'s contribution would be aggregated with AFT's contribution, it would exceed the \$5000 limit for multicandidate committees.

You may, however, use an alternative apportionment in specific cases as long as AFT-COPE, SEIU-COPE, and PEF-COPE agree to this apportionment and no excessive contributions result. If you do so, you should provide written instructions to recipient political committees or candidates so those committees can monitor their acceptance of contributions subject to the shared limits of the three committee contributors. 2 U.S.C. 441a(f), 11 CFR 102.9(a), 102.9(c) The written instructions should also be maintained as contribution records of PEF-COPE(II) for three years after the contribution is reported. 11 CFR 104.14(b), also see 11 CFR 102.9(b)(1), 102.9(c).

PEF-COPE(II) will be affiliated with AFT-COPE and SEIU-COPE as of the date it is formed, and PEF-COPE(II)'s contributions must be aggregated with AFT-COPE and SEIU-COPE contributions made to the same candidate for the same election, even if AFT-COPE or SEIU-COPE made the contributions prior to the establishment of PEF-COPE(II). See Advisory Opinion 1985-27.

Finally, the Commission notes that AFT-COPE, SEIU-COPE, and PEF-COPE(I) will be required to identify PEF-COPE(II) as an affiliated committee on their respective statements of organization. 2 U.S.C. 433(b)(2); 11 CFR 102.2(a)(1)(ii). PEF-COPE(II) will similarly have to identify AFT-COPE, SEIU-COPE, and PEF-COPE(I) as its affiliated committees. All four committees will retain their separate entity status for purposes of filing reports and statements under the Act. 2 U.S.C. 434(a)(4). See, e.g., Advisory Opinion 1987-34.

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,

(signed)

Joan D. Aikens  
Vice Chairman for the Federal Election Commission

Enclosures (AOs 1987-34, 1986-42, 1985-27, 1985-6, 1984-36, 1983-28, 1981-54, 1980-40)

1/ PEF's current SSF will be referred to as PEF-COPE(I) throughout this opinion to distinguish it from the committee PEF is now proposing to form, also to be named PEF-COPE. That committee will be referred to as PEF-COPE(II) throughout this opinion.

2/ NYSUT VOTE/COPE is the SSF of NYSUT, which is the New York affiliate of AFT.

3/ This is true of any of the committees established by PEF, such as PEF-COPE(I). Based on the facts presented in your request, the Commission is unable to discern any difference between PEF-COPE(II) and PEF-COPE(I), which has considered itself affiliated with AFT-COPE and SEIU-COPE. Your Advisory Opinion request implies that PEF-COPE(I) should no longer be viewed as affiliated with AFT and SEIU. While PEF-COPE(I) could seek to revoke its previously disclosed affiliated political committee status, it could do so only if it could demonstrate a substantial change in PEF's organizational relationship to AFT and SEIU. However, the situation presented here does not indicate that the relevant relationships have changed. See, Advisory Opinion 1983-28.