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ADVISORY OPINION NO. 2016-23

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Use Of Campaign Funds For Personal Use

The use of campaign funds for personal use is prohibited under both the Ethics Act and the Fair Campaign Practices Act (FCPA). The Commission uses the "but for" test to determine whether expenses may be paid for with campaign funds pursuant to these Code sections. Personal use is any use of funds in a campaign account to fulfill a commitment, obligation or expense of any person that exists for reasons irrespective of the person's status as a candidate or officeholder. Stated in terms of the applicable test, the expense may be paid for with campaign funds if it would not exist "but for" the person's status as a candidate or officeholder.

The payment from surplus campaign funds of travel expenses associated with automobile usage is allowed when incurred for campaign purposes and where reasonably related to performing the duties of the office held, but only insofar as the campaign maintains records justifying such use.

Public officials may receive reimbursement for mileage incurred pursuant to the duties of the office held either from the State of Alabama as allowed to state employees generally, or from their campaign at either the state rate or the IRS-approved standard rate, but not from both sources, and as long as the official maintains the same record keeping as noted herein.

ISSUE PRESENTED

The Commission has been asked on multiple occasions to provide guidance on the issue of what is meant by “necessary and ordinary” expenditures of a campaign and “expenditures that are reasonably related to performing the duties of the office held” under Ala. Code § 17-5-7. In order to give uniform guidance to public officials and to articulate a standard moving forward, the Commission generates the following Advisory Opinion:

FACTS AND ANALYSIS

Ala. Code § 17-5-7 (2015) states:

“(a) Except as provided in subsection (d) and in Section 17-5-7.1, a candidate, public official, or treasurer of a principal campaign committee as defined in this chapter, may only use campaign contributions, and any proceeds from investing the contributions that are in excess of any amount necessary to defray expenditures of the candidate, public official, or principal campaign committee, for the following purposes:

- (1) Necessary and ordinary expenditures of the campaign.
- (2) Expenditures that are reasonably related to performing the duties of the office held. For purposes of this section, expenditures that are reasonably related to performing the duties of the office held do not include personal and legislative living expenses, as defined in this chapter ...”

Ala. Code § 36-25-6 (2015) states:

“Contributions to an office holder, candidate, or to a public official’s inaugural or transitional fund shall not be converted to personal use.”

Using campaign funds for personal use is prohibited under both the Ethics Act and the Fair Campaign Practices Act (FCPA). Campaign funds cannot be used as a way simply to supplement income. The Commission uses the “but for” test to determine whether expenses may be paid for with campaign funds pursuant to these Code sections. Personal use is any use of funds in a campaign account to fulfill a commitment, obligation or expense of any person that exists for reasons irrespective of the person’s status as a candidate or officeholder. Stated in terms of the applicable test, the expense may be paid for with campaign funds if it would not exist “but for” the person’s status as a candidate or officeholder. To further clarify this test, the incidental, minor, and occasional personal use of some small items that are easily susceptible to dual usage (mobile phones, ipads, computers, subscriptions for internet data access) does not render these purchases a use of funds for personal use in violation of the Act as long as the primary purpose of the expenditure satisfies this test.

The Commission presumes the following expenses to be for personal use and neither “reasonably related to performing the duties of the office held” nor “necessary and ordinary expenditures of the campaign”:

1. Personal and legislative living expenses as defined in the Fair Campaign Practices Act, Ala. Code § 17-5-1 et seq., which include: household supplies, personal clothing, tuition payments, mortgage, rent, or utility payments for a personal residence; admission to an entertainment event or fees for a country club or social club, unless tied to a specific campaign event or functions involving constituents;
2. Any expense that would exist irrespective of a candidate’s campaign or an officeholder’s official duties;
3. Household food items purchased for consumption by the candidate, officeholder, and his or her family or dependents;
4. Funeral, cremation and burial expenses;
5. Tuition payments for the candidate’s or officeholder’s family or dependents, or any other person;
6. Mortgage, rent and utility payments for a candidate’s or officeholder’s personal residence, even if a portion of the space is used for campaign or official purposes;
7. Investment expenses, unless all of the investment and its proceeds are used for campaign purposes or one of the specifically enumerated purposes in the FCPA;
8. Entertainment expenses unless tied to a specific campaign event;
9. Dues and gratuities for health clubs, recreational facilities and other nonpolitical organizations unless tied to a specific campaign event;
10. Salary payments to the candidate’s family, unless the family member is providing a bona fide service to the campaign and the payments reflect the fair market value of those services and are properly documented by the campaign;
11. Signs or markers designating roadways, etc., or a portion thereof in honor of the officeholder or candidate or a member of their family.

The Commission presumes the following expenses NOT to be for personal use and to be either “reasonably related to performing the duties of the office held” or “necessary and ordinary expenditures of the campaign”:

1. Any permitted use under the FCPA which includes in addition to (1) and (2) set out above the following as specifically set out in Ala. Code § 17-5-7:
 - a) donations to the State General Fund, the Education Trust Fund, or equivalent county or municipal funds;
 - b) donations to an organization to which a federal income tax deduction is permitted under subparagraph (A) of paragraph (1) of subsection (b) of Section 170 of the Internal Revenue Code of 1986, as amended, or any other charitable, educational, or eleemosynary cause of Section 501 of Title 26 of the U. S. Code (unless in doing so the expenditure is converted to personal use by the candidate or officeholder, their family or a business with which they are associated);
 - c) inaugural or transitional expenses;
 - d) donations to a legislative caucus organization registered under this chapter which does not operate as a political action committee;
 - e) legal fees and costs associated with any civil action, criminal prosecution, or investigation related to conduct reasonably related to performing the duties of the office held.
2. Flowers or cards for funerals of deceased supporters, constituents or colleagues, provided the amount expended is reasonable and customary, and in lieu of flowers donations to charities, organizations, etc. as the family of the deceased publicly designates;
3. Actual and necessary transportation, lodging expenses, food, beverages, and registration fees actually incurred and required for the attendance of a candidate, officeholder, and his or her staff at a conference or event, where but for the person’s official status he or she would not attend, and where the primary purpose for attending is campaign-related or is official and is consistent with each person’s official duties (for example, when the person speaks on a subject related to his or her official position, duties, committee assignment, etc., and for staff members when that person will engage in significant campaign-related or officeholder-related activity on the candidate’s or officeholder’s behalf), and provided the candidate, officeholder or staff member is not reimbursed for these expenses from any other source;

4. De minimis gifts or promotional items that are campaign-related or appropriate for the occasion (e.g., graduation, holiday season, etc.), as well as seasonally or occasion-appropriate cards which are provided to friends, supporters, colleagues, constituents or campaign staff;
5. Campaign signs, literature, t-shirts, hats, stickers, and banners;
6. For public officials at the state level of government, office furniture used in the office provided to them by the State of Alabama for use in their official position (see Opinion of the Attorney General, AO 2000-106);
7. Dues and donations to organizations commonly referred to as “civic organizations” which include, for example, Rotary, Lions, Kiwanis, etc., local Chambers of Commerce, veterans’ posts, fire or rescue groups, or local civic leagues (for example, Junior League, etc.), or religious tax-exempt nonprofit organizations.

Regarding automobile expenses for candidates and public officials being paid from surplus campaign funds, the Commission previously addressed this issue in Advisory Opinions 95-103, 96-01 and 96-09, all of which were issued to members of the Legislature. In 96-09, the Commission “cautioned” legislators that reimbursement “should be documented as if for income tax purposes,” and we herein reiterate that advice in terms of documentation. In addition, we offer the following specific guidance which is intended to be more helpful and less arbitrary than the proration standard articulated in AO 95-103 in light of reimbursement changes made by Amendment 871 that arose after the date of those opinions. Moreover, public officials at all levels of government have asked for more specific guidance regarding the proper method for reimbursement of these expenses.

The payment from surplus campaign funds of travel expenses associated with automobile usage is allowed when incurred for campaign purposes and where reasonably related to performing the duties of the office held.

If a candidate or public official wishes to use his or her campaign funds for reimbursement of such travel expenses, the following must be observed:

1. The campaign may reimburse the candidate, campaign workers or public official for actual miles driven relating to campaign activity at a reasonable mileage rate not to exceed the rate or terms allowed to state employees generally, or in the alternative the IRS-approved standard rate.
2. The campaign must maintain records showing the date of travel, destination(s) involved, purpose of travel and odometer readings (or another method that accurately captures the allowed mileage such as point-to-point mileage projections that are generally available

via the internet or mapping features of most smart phones, as long as the mileage recorded is accurate) of each trip for which reimbursement is allowed.

3. The candidate or public official is responsible for ensuring that accurate odometer readings are maintained.
4. For vehicles owned or leased personally by a candidate or a campaign employee / volunteer, or a public official, campaign funds may not be used to pay maintenance costs where mileage is reimbursed either at the rate and on terms allowed to state employees generally or at the IRS-approved standard rate, as the rate per mile under both methods necessarily includes anticipated maintenance costs.
5. If a public official does not receive reimbursement from their government employer or another authorized provider (where permitted by applicable law and agency policy) for mileage expenses reasonably related to performing the duties of the office held, then the public official may obtain mileage reimbursement from his or her campaign funds at the rate allowed for state employees generally, or in the alternative, at the IRS-approved standard rate. In other words, the public official may not use his or her campaign funds for mileage reimbursement if they are being reimbursed from any other source. If reimbursed from campaign funds, the public official must maintain the same record keeping as provided for in “2” above.
6. A campaign may lease a vehicle from a third party for campaign use. The campaign may lease a car for the exclusive use of the campaign, provided it pays the fair market value of all costs associated with the car pursuant to the lease or rental agreement or unless it is received as an in-kind contribution and is reported as such. To the extent minimal personal use of a campaign vehicle during a campaign is unavoidable (for example, during a protracted campaign which may include, for example, an entire weekend of campaigning), the candidate must reimburse the campaign for any personal use using the same formula that they use above for personal cars consistent with the documentation method in “2” above.

Following the election, the candidate may not use campaign or surplus funds to reimburse the candidate or campaign employees / volunteers for automobile expenses or travel expenses unless the expense is associated with pre-election campaign activities and the request for the reimbursement is submitted to the campaign with documentation verifying that it was associated with pre-election campaign activities.

These lists are not exhaustive. The determination whether an expense is allowable is a factual determination to be made by the Alabama Ethics Commission. The Commission may

periodically issue advisory opinions determining allowable expenditures and such opinions should be considered as an addition to any listing of expenditures herein. Any use of campaign funds related to either the campaign or performing the duties of the office held should be properly and accurately documented in all instances.

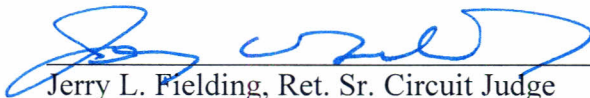
CONCLUSION

The use of campaign funds for personal use is prohibited under both the Ethics Act and the Fair Campaign Practices Act (FCPA). The Commission uses the “but for” test to determine whether expenses may be paid for with campaign funds pursuant to these Code sections. Personal use is any use of funds in a campaign account to fulfill a commitment, obligation or expense of any person that exists for reasons irrespective of the person’s status as a candidate or officeholder. Stated in terms of the applicable test, the expense may be paid for with campaign funds if it would not exist “but for” the person’s status as a candidate or officeholder.

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AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on February 1, 2017.



Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission