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ADVISORY OPINION NO. 2018-EC- 001

Issued July 27, 2018

The Arkansas Ethics Commission (the "Commission") has received a written advisory opinion request from Mr. Ryan Agnew, Esq., C/O People for Gayatri Agnew of Bentonville, Arkansas. Therein, he asks the following question:

Are there any circumstances under which childcare expenses of the candidate may be paid out of campaign funds?

FACTS: The candidate and her husband work full time. The couple has two young children, ages two and three-and-a-half. During the regular workweek, the children are enrolled in daycare/pre-k, from roughly 8 a.m.-5 p.m. Only the evening and weekend hours of childcare needs are the subject of this request, as those are the hours during which the candidate is available to conduct her campaign. Most often, when the candidate is out campaigning, the children are watched by her husband. However, due to his work demands and frequent travel, he is not always available. Additionally, there are times when the candidate may benefit from her husband's attendance at campaign events. During these situations, childcare is required.

ANSWER: In short, yes. Under the facts presented, reasonable childcare costs related to a candidate attending campaign events or engaging in campaign activity while the candidate's spouse is unavailable to care for the candidate's children or when the spouse is needed to attend the campaign event would be a permissible campaign expenditure.

ANALYSIS AND LEGAL SUPPORT: Ark. Code Ann. § 7-6-203(f)(1) provides that "[a] candidate shall not take any campaign funds as personal income." Additionally, Ark. Code Ann. § 7-6-203(f)(4) provides that "[f]or purposes of this subsection, a candidate who uses campaign funds to fulfill any commitment, obligation, or expense that would exist regardless of the candidate's campaign shall be deemed to have taken campaign funds as personal income." Section 209 of the Commission's Rules on Campaign Finance & Disclosure ("RCF&D"), entitled "Personal Expenses-Prohibited Uses", provides a list of

expenses that are considered “personal expenses” *per se*: (a) Household Food Items and Supplies, (b) Clothing, (c) Mortgage, Rent, and Utility Payments (d) Membership Dues, Fees, or Other Gratuitous Payments to Nonpolitical Organizations, other than Charities, and (e) Donations and Contributions to Churches. It is noted that “childcare expenses” are not listed as a *per se* personal expense.

Section 223(a) of the RCF&D, entitled “Allowable Expenditures-Miscellaneous Campaign-Related Expenditures,” provides, in pertinent part, “[i]n addition to those expenditures listed throughout these rules, candidates and officeholders are free to expend campaign funds on any purpose designed to further their campaign or office as long as it is not for personal income or otherwise prohibited by law,” followed by a list of permissible expenditures, and Section 223(b) specifically states that “[t]his list is not exhaustive.”

Based on the facts presented by the requestor, the candidate wishes to expend campaign funds to pay for the cost of childcare expenses for the candidate’s young children when the candidate’s spouse is unable to watch the children or is needed to attend an event with the candidate, and only for periods that the candidate would not need childcare if not for the campaign. The candidate’s children would be in daycare/preschool 8 a.m.-5 p.m. on weekdays even if the candidate were not running for office, so such expenses would exist regardless of the campaign, and would therefore not be a legitimate campaign expense. However, the candidate would not need to attend various civic or political events on nights and weekends were he/she not a candidate, so the cost of childcare for those times is not an expense that would exist regardless of the candidate's campaign. Again, under the facts presented, it is the Commission’s opinion that reasonable childcare costs related to a candidate attending campaign events or engaging in campaign activity while the candidate’s spouse is unavailable to care for the candidate’s children or when the spouse is needed to attend the campaign event would be a permissible campaign expenditure.

As with all campaign expenditures, record keeping sufficient to evidence compliance with all relevant campaign finance laws would be needed. For example, if a candidate needed three (3) hours of childcare to attend an evening candidates panel in the candidate’s community, the candidate would be advised to keep a record of the payee (i.e., the babysitter), and the nature, time, date, and location of the event (e.g., Candidates Panel, 6:30 p.m., May 1, 2018, VFW on Main Street). Furthermore, Ark. Code Ann. § 7-6-207(b)(1)(F) provides that a candidate’s contribution and expenditure reports shall include “[a] list of paid campaign workers and the amounts they workers were paid.” In addition, as with all campaign expenditures, campaign funds should not be used to pay for childcare for an event that the candidate would have attended whether or not he/she was running for office, for example, an annual event that the candidate has attended for many, multiple

years when not running for office.¹ Likewise, a candidate wishing to hire a childcare worker for legitimate childcare needs related to the campaign should refrain from using campaign funds to hire a relative within the first degree of relation if the candidate is unopposed.²

CONCLUDING REMARKS: This advisory opinion is limited to the specific set of facts or activity set forth in the request. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law.

This advisory opinion is issued by the Commission pursuant to Ark. Code. Ann. § 7-6-217(g)(2).

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By: Jill Rogers Barham

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¹ For example, a businessperson who has paid dues in a local membership organization for twenty (20) years out of personal or business funds should not begin paying such dues out of campaign funds merely because he/she is now running for office.

² Section 214 of the Commission's RCF&D provides as follows:

(a) A candidate may use campaign funds to employ people to work for the campaign and may pay those employees reasonable wages or expenses provided payment relates to campaign activity. A candidate or the campaign is allowed to hire employees or contract labor on a temporary basis to assist in such campaign matters as conducting polls, providing transportation for electors to the polls, posting signs and other forms of political advertising, handling mail and telephone solicitation, and other tasks related to campaign activity.

(b) A candidate who is *unopposed* may *not* use campaign funds to employ *family members*. If the candidate has an opponent, he or she may employ members of his or her family as campaign workers, provided the wage paid is reasonable. What constitutes a reasonable wage is a factual determination subject to review by the Arkansas Ethics Commission. Excessive wages may be viewed as personal income in violation of Ark. Code Ann. § 7-6-203. (*Emphasis added*).