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Opinion No. 91-EC-004

June 24, 1991

Senator Charlie Cole Chaffin
12180 Interstate 30
Benton, AR 72015

Dear Senator Chaffin:

On June 3, 1991, this office received your request, under authority of Initiated Act 1 of 1988 and Initiated Act 1 of 1990, for an official opinion. Your requests deal with campaign finance and your explanation that you've used (in excess of \$500.00) monies, retained from your successful 1990 campaign for the Arkansas Senate, for "advertising, contributions, and partial payment to a consultant for the 1992 primary election" (in excess of \$500.00).

Your question is:

"Is the money remaining in a campaign account from one election and used for campaign expenditures in another election a contribution from the candidate?"

In order to arrive at my opinion in response to your question, I have endeavored to answer two (2) other questions not specifically addressed in your request, but which of necessity must affect your circumstance. The first is:

What do the Acts (Initiated Act 1 of 1988 and Initiated Act 1 of 1990) mandate or permit be done with monies retained from previous political campaigns?

ACA Section 7-6-203 provides, specifically:

(j) Within thirty (30) days following a general election, a candidate shall turn over to either (1) the State Treasurer for the benefit of the general revenue fund of the state apportionment fund, (2) an organized political party as defined in Arkansas Code 7-1-101 (1), or (3) the contributors to the candidate's campaign any balance of campaign funds over expenses incurred as of the day of the election except for (1) an amount equal to the yearly salary, excluding expense allowances, set by Arkansas law for the office sought and (2) any funds required to reimburse the candidate for personal funds contributed to the campaign or to repay loans made by financial institutions to the candidate and applied to the campaign."

That section of the law clearly limits what may be done with funds a candidate accumulates during a campaign. Not only is the law clear as to what may be done with those funds - but it is equally clear what the people of Arkansas intended in enacting the law: to end the taint and appearance of taint upon the electoral process by putting a stop to the accumulation of funds by public officials and candidates for public office, which were unwarranted and out of proportion to that necessary for the public election process.

In order to accomplish this the people required that funds accumulated by a campaign, but no longer necessary for the election process, be (1) given to the state, (2) given to the candidate's political party, or (3) returned to the candidate's contributors. There are specific exceptions a candidate may take to the expurgation requirement. Those exceptions are specified in the Act as: (a) the retention of a sufficient amount to reimburse a candidate's personal funds expended on the campaign or to retire a personal loan taken out to finance the campaign, or (b) an amount equal to the yearly salary of the office sought by the candidate. (1) The reasoning upon which the exception for retaining funds to retire personal funds and loans to the campaign seems easily discernable. That is, because the act does not prohibit a candidate from using his or her own funds, nor from arranging loans from public institutions to fund his or her candidacy, it logically follows that he or she should be allowed to retire those loans and recoup his or her personal funds, to the extent possible, from assets the campaign generated.

The exemption which allows a candidate to retain "an amount equal to the yearly salary . . ." is not so clear either in its purpose

or the reasoning upon which it is based. This lack of clarity is compounded by the failure of the act to guide the candidate as to what purposes the retained funds may be put. There could, of course, be many uses to which these funds may be put. The most apparent options are (1) some form of personal use, (2) the continuation of a form of a campaign account or (3) use in the successful candidate's operation of this or her elective office.¹

As the people of Arkansas were quite specific in restricting campaign activity which they found most threatening to their political process, it is logical that particular restrictions on the use of monies retained after an election could have been voted into the law if such restrictions were desired by the people. As there are no such restrictions placed in the Act, it is my opinion that a candidate may convert an amount equal to the yearly salary for the office sought, excluding expense allowances, to any use the former candidate chooses, including to his or her personal use or to retain a candidacy campaign finance fund.

¹There are some thirty five (35) states that now have their campaign and election processes governed by ethics and/or campaign commissions or offices. These several offices have formed an organization to keep abreast of ethics law developments, for education and for technical assistance to the several state offices. Arkansas is a member of this group, The Council on Governmental Ethics Law (COGEL).

A review of the legislation, rules and regulation of the several states reveal that there is a variance as to whether a candidate may retain any of the surplus funds when a campaign ends, and to what use any funds retained may be put. Some states prohibit the retention of any campaign funds once the election is held; others allow limited retention of funds, but restrict the purposes for which the funds may be used. What is clear from the data is that, among those states that do prohibit the retention of surplus funds, as well as those states having limitations on the use to which those funds may be put, the prohibitions and limitations are clearly spelled out in legislation or regulations. COGEL has developed a Model Law for Campaign Finance, Ethics and Lobbying Regulations. That model law would not allow the retention of funds after an election, except for those "obligated for the payment of expenses incurred to further the candidate's candidacy". The model law requires that surplus funds be granted to the state's general fund; returned to contributors on a pro-rata basis, turned over to a partisan candidate's political party or a combination of those options.

The second preliminary question, paraphrased, is:

At what point in Arkansas' electoral process may a person be considered a candidate for office?

As regards the question of when a "candidacy" or campaign for the next election begins, the Act itself does not give a triggering date or event.² However, ACA Section 7-6-201 (3) does provide:

"Candidate" means any person who has knowingly and willingly taken affirmative action, including the solicitation of funds, for the purpose of seeking nomination for or election to any public office;"

It is therefore, my opinion that you became a "candidate" when you "spent more than \$500.00 for advertising, contributions and partial payment to a consultant for the 1992 primary election".

Regarding your specific question,

"What is a contribution?" The act, does not provide substantial guidance. A definition is, however, provided in other election laws. Specifically, ACA Section 7-6-201 provides:

(2) (A) "Contribution" means, whether direct or indirect, advances, deposits, or transfers of funds, contracts, or obligations, whether or not legally enforceable, to a candidate, committee, or holder of elective office, made for the purpose of influencing the nomination or election of any candidate;

(B) "Contribution" includes the purchase of tickets for events such as dinners, luncheons, rallies, similar fund raising events; the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office; and any payments for the services of any person

²COGEL's model law for campaign finance, ethics and lobbying regulation has suggested that an "election cycle" should begin the day after the general election, and continue up to and include the following general election. A suggested alternative would designate the beginning of the "election cycle" as the date on which a declaration or petition of candidacy may be filed.

serving as an agent of a candidate or committee by a person other than the candidate or committee or persons whose expenditures the candidates or committee must report under this subchapter. The term "contribution" further includes any transfer of anything of value received by a committee from another committee;

(C) "Contribution" shall not include noncompensated, nonreimbursed, volunteer personal services or travel;

(3) "Expenditure" means a purchase, payment, distribution, gift, loan, or advance of money or anything of value, and a contract, promise, or agreement to make an expenditure, made for the purpose of influencing the nomination or election of any candidate;

These portions of Arkansas' election laws provide wide definition of a "contribution"; it does not, however, answer the question of whether monies spent from the former campaign ("the carryover") on the new campaign is a "contribution".

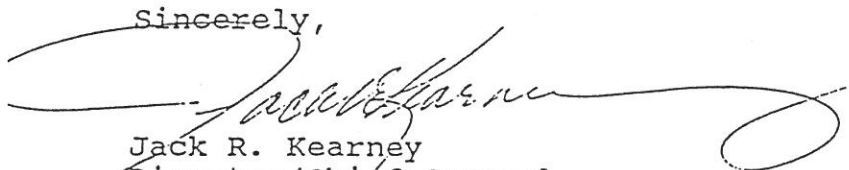
Because, as we opined herein, our election laws provide that a specified amount may be carried over from one election to another, and that is our opinion this "carryover" may be used for any purpose - including for a continuing campaign account, it would appear entirely consistent and in keeping with the whole of Arkansas' election laws that this allowable "carryover" not be viewed as a "contribution". We note that disclosure of this amount has already been made in your final or supplemental report for the previous campaign, and any expenditure must be detailed in future reports.

In summation it is this Commission's opinion that (a) Arkansas law allows a candidate to retain an amount of money equal to the salary of the office which that candidate sought, and places no restrictions on the use of that money, including using it to retain a re-election account. (b) When any person knowingly and willingly takes affirmative action for the purpose of seeking nomination or election to public office, he or she becomes a "candidate". Your actions, as described in your letter, make you a "candidate".

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(c) The expenditure of the allowable "carryover" from your former campaign is an "expenditure" under your new candidacy, it is not a "contribution" either from yourself or any other entity.

Sincerely,



Jack R. Kearney
Director/Chief Counsel

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