

ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 2022-EC- 002

Issued: August 19, 2022

The Arkansas Ethics Commission ("Commission") has received a written advisory opinion request, dated July 7, 2022, from Mr. Kevin A. Crass, an attorney in Little Rock, Arkansas. Therein, Mr. Crass asks for an advisory opinion concerning the following question:

Question Presented:

Can campaign funds be used to provide security to protect a candidate and the candidate's immediate family and staff while at campaign events, campaign headquarters, and during the candidate's time at home?

Background:

In the request, it says to assume that the candidate for office in Arkansas has received specific, targeted threats of physical harm and death. Moreover, it states that based upon a general climate of violence towards public officeholders and candidates for public office, personal security professionals have recommended that the candidate have enhanced security protection at campaign events, campaign headquarters, and during the candidate's time at home. The request notes that the threats specifically mentioned going to the candidate's home.

Applicable Law:

Ark. Code Ann. § 7-6-203 (f)(1) provides, in pertinent part, as follows: "A candidate shall not take any campaign funds as personal income." The Arkansas Ethics Commission Rules on Campaign Finance & Disclosure ("RCF&D"), § 208 (a), "Use of Campaign / Remaining Campaign Funds- Personal Use Defined" provides as follows:

- (1) For purposes of this section and throughout these rules, a candidate or officeholder who uses campaign funds or remaining campaign funds to fulfill any commitment, obligation or expense that would exist regardless of the candidate's campaign or officeholder activity and an officeholder who uses remaining campaign funds to fulfill any commitment, obligation or expense that would exist regardless of the duties and responsibilities of his or her office shall be deemed to have taken campaign funds as personal income.

- (2) Candidates or officeholders may use campaign funds or remaining campaign funds to fulfill any commitment, obligation, or expense authorized by law, or permitted by an Arkansas Ethics Commission rule or opinion at the time of the expenditure, or reasonably and legitimately related to a campaign or officeholder activity.

The RCF&D provides some examples of *per se* personal use expenses, specifically (a) household food items and supplies; (b) clothing; (c) mortgage, rent, and utility payments; (d) membership dues, fees, or others gratuitous payments to nonpolitical organizations, other than charities; and (e) donations and contributions to churches.

The RCF&D specifically provides for some examples of expenses that will not be considered personal use, including automobile expenses for use of a personal vehicle for actual miles driven for campaign purposes (RCF&D § 211), childcare expenses while campaigning (Ark. Code Ann. 7-6-603 (f)(2)) and Adv. Op. 2018-EC-001), lost income [RCF&D § 207(a)(3)], purchase of a cake or other perishable item of food at a fund-raising event held by a volunteer agency [RCF&D § 208(b)], purchase of advertisement thanking voters [RCF&D § 208(c)], and a candidate's own personal expenses for food, lodging, or travel to attend a national presidential nominating convention [RCF&D § 208(d)]. Moreover, RCF&D § 208(d) provides, "If an expense is the result of campaign or officeholder activity, then it is not considered personal use and not prohibited by those sections and subsections herein limiting the personal use of campaign funds or remaining campaign funds."

The RCF&D § 210 "Personal Use-Determination by Arkansas Ethics Commission" likewise provides as follows:

Whether an expense or use of campaign funds is to be considered a "personal use" or "personal expense" and therefore prohibited by the law and these rules is a factual determination to be made by the Arkansas Ethics Commission. A person may seek an advisory opinion from the Commission concerning whether a particular use of funds is to be considered "personal use."

Analysis & Conclusion:

A campaign could use campaign funds to provide security to protect a candidate and the candidate's immediate family and staff while at campaign events, the campaign headquarters, and during the candidate's time at home without violating Ark. Code Ann. § 7-6-203 (f)(1). A person not running for office does not need constant security to protect their personal, physical safety; most people have not received specific, targeted threats of physical harm and death.

The background facts clearly limit the time period to not include broadly twenty-four (24) hours a day, nor while on vacation, nor, generally, when leaving their home. The locations and times provided seem to be limited to places where the candidate is asserting themselves as a candidate, and at their home, where they have received specific threats.

Various, potential facts regarding the nature of the security expenses could change the analysis. If a person has paid for a home alarm system with monthly monitoring for years prior to running for office, then the now-candidate should not use campaign funds to pay for the already existing security system with monthly monitoring, for that expense existed regardless of the campaign, status as a candidate, or officeholder activity. Likewise, a candidate wishing to hire professional security 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.ⁱⁱⁱ

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.

In conclusion, it should also be noted that the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission cannot opine regarding the permissibility of a specific past event.

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
Jill Rogers Barham

ⁱ Ark. Code Ann. § 7-6-203 (f) (1) (1) A candidate shall not take any campaign funds as personal income.

(2) A candidate shall not take any campaign funds as income for his or her spouse or dependent children, except that:

(A) This subsection shall not prohibit a candidate who has an opponent from employing his or her spouse or dependent children as campaign workers;

(B) The use of campaign funds to pay a candidate's childcare expenses shall not be considered a taking of campaign funds as personal income if the campaign funds are used to pay for childcare for the time the candidate is engaging in campaign activity and the childcare expenses would not exist in the absence of the campaign; and

(C) Any candidate who has an opponent and who, during the campaign and before the election, takes a leave of absence without pay from his or her primary place of employment shall be authorized to take campaign funds during the campaign and before the election as personal income up to the amount of employment income lost as a result of the leave of absence.

(3) A candidate who takes campaign funds during the campaign and before the election under a leave of absence pursuant to the provisions of subdivision (f)(2) of this section may elect to treat the campaign funds as a loan from the campaign fund to the candidate to be paid back to the campaign fund by the candidate.

(4) (A) (i) For purposes of this subsection, a candidate or officeholder, who uses campaign funds to fulfill any commitment, obligation, or expense that would exist regardless of the candidate's campaign or officeholder activity, shall be deemed to have taken campaign funds as personal income.

(ii) Candidates or officeholders may use campaign funds to fulfill any commitment, obligation, or expense authorized by law, or permitted by an Arkansas Ethics Commission rule or opinion at the time of the expenditure, or reasonably and legitimately related to a campaign or officeholder activity.

(iii) If a candidate or officeholder is assessed a fine by the Arkansas Ethics Commission under § 7-6-218(b)(4)(B) for the use of campaign funds as personal income, a candidate or officeholder shall not use campaign funds or carryover funds to pay the fine.

(B) The use of campaign funds to purchase a cake or other perishable item of food at a fund-raising event held by a volunteer agency, as defined in § 16-6-103, shall not be considered a taking of campaign funds as personal income.

(C) The use of campaign funds to purchase advertising prior to the date the final report is due to be filed thanking voters for their support shall not be considered a taking of campaign funds as personal income.

(D) The use of campaign funds to pay a candidate's own personal expenses for food, lodging, or travel to attend a national presidential nominating convention shall not be considered a taking of campaign funds as personal income.

(5) If a candidate loses an election or if an officeholder is no longer in office, personal use of campaign funds remains prohibited by this section unless the expenses relate to a future candidacy and shall comply with subdivision (f)(4) of this section.

(6) Knowingly taking campaign funds as personal income is a:

(A) Class B felony if the value of the benefit is twenty-five thousand dollars (\$25,000) or more;

(B) Class C felony if the value of the benefit is five thousand dollars (\$5,000) or more but less than twenty-five thousand dollars (\$25,000);

(C) Class D felony if the value of the benefit is two thousand five hundred dollars (\$2,500) or more but less than five thousand dollars (\$5,000); or

(D) Class A misdemeanor if the value of the benefit is less than two thousand five hundred dollars (\$2,500).

(7) It is an affirmative defense to a prosecution for taking campaign funds as personal income if the candidate or officeholder shows by a preponderance of the evidence that the personal property was retained as campaign funds, and the candidate or officeholder:

(A) Reported the personal property as campaign funds; and

(B) Retained or disposed of the personal property in the manner that is required by law for campaign funds.

ⁱⁱ Rules on Campaign Finance & Disclosure, § 208 (a) Household Food Items and Supplies-This includes food purchased for day-to-day consumption in the personal residence and supplies purchased to maintain the personal

residence. It does not include food and supplies for fund-raising activities (even if they take place in the candidate's home) and food or refreshments for meetings and gatherings related to the candidate's campaign.

(b) Clothing-This includes all attire for political or personal functions. It does not include clothing of nominal value such as T-shirts or caps imprinted with a campaign logo or slogan or a candidate's name. Such items may be purchased with campaign funds and are a legitimate campaign expense.

(c) Mortgage, Rent and Utility Payments-This includes any payments with respect to a personal residence of the candidate or his or her family, even if a portion of the residence is used by the campaign. It does not include (i) payments made by a candidate with respect to other buildings or offices or office space used solely for campaign purposes, such as the campaign's headquarters, even if the candidate owns the space used, so long as the space is not the personal residence of the candidate or his or her family and the campaign pays a fair market value for use of the space; or (ii) payments made by a member of the General Assembly with respect to an apartment leased solely for use while in the capitol on official business so long as the apartment is not maintained as the officeholder's primary personal residence and per diem is used to pay a proportional share of the rent and utilities incurred in connection with maintaining the apartment. That share shall be determined using a fraction, the numerator of which shall be the number of days per diem was received in a particular month and the denominator of which shall be the total number of days in that month. Furthermore, this prohibition does not apply to charges for long distance telephone calls made for campaign or officeholder purposes which may originate from the candidate's residence.

(d) Membership Dues, Fees or Other Gratuitous Payments to Nonpolitical Organizations, Other Than Charities-Campaign funds may not be used to make payments to a country club, health club, recreational facility or other nonpolitical organization unless the payments are made in connection with a fund-raising event or other political event which takes place on the organization's premises. The prohibition does not include membership dues in an organization which may offer political contacts, such as community-based religious organizations, ethnic organizations and other civic organizations.

(e) Donations and Contributions to Churches-Donations and contributions to churches are not allowed from campaign funds while a candidate is seeking office unless the candidate had, prior to deciding to run for office, regularly given money to the church or had been a previous member of the particular church to which the expenditure is intended. Following the conclusion of the campaign, a candidate may donate or contribute remaining campaign funds to nonprofit, tax-exempt organizations as provided in Ark. Code Ann. § 7-6-203(h)(1)(C).

ⁱⁱⁱ 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*).