Barnett, Wayne

From: Philip Lloyd
Sent: Friday, December 16, 2011 11:59 AM
To: Barnett, Wayne
Subject: Request for Clarification
Attachments: AG Opinion.pdf

I am an accountant in Seattle and have served as Treasurer for a large number of political campaigns over the past 17 years including several campaigns for City of Seattle candidates and ballot issues.

I am writing to clarify an apparent inconsistency in advice given by staff of Seattle Ethics and Elections (SEEC) and the Washington Public Disclosure Commission (PDC) on the issue of whether Surplus Funds transferred from one campaign to another for a different office are subject to contribution limits for the new office. PDC staff advises that such transfers are not subject to contribution limits and SEEC staff advises that they are subject to limits.

I have attached a 1995 memorandum from the Attorney General's Office dealing with surplus funds. Also below are the instructions from the PDC's Local & Judicial Candidates Manual, dealing with left over contributions that are defined as Surplus Funds.

> "A candidate who wants to use surplus funds from a previous campaign to seek an office different from the one for which the donations were collected also must get written approval to do so from the contributors of the funds left over from that earlier campaign. Use the process described above for identifying whose contributions are left. Again, if written permission is not provided for some contributions, those contributions may not be used for the new campaign, but must be spent for one of the other purposes outlined under Surplus Campaign Funds discussed below.
>
> When a candidate is transferring contributions left over from a previously completed election campaign to a new campaign for a different office, those contributions that are moved to the new campaign are NOT attributed to their original source. The funds are simply moved as a lump sum of surplus funds to the new account. There may be multiple transfers to the new account, depending on when the campaign receives the written permission. On the C-3 report showing the deposit of the surplus money, simply note that surplus funds from a previous campaign are being deposited into the account with permission from the donors. (Keep the permission notices as part of the campaign records. Do not send copies of them to PDC unless a PDC staff member asks you to do so.)"

Below is the information from WAC 390-16-238, though this only addresses the same office last sought.

> (2) For candidates as defined in RCW 42.17.020(9), if at any time after the last day of the election cycle, any contribution is received or expenditure is made from such surplus funds for any purpose which would qualify the recipient or person who made the expenditure as a candidate or authorized committee, it will be presumed the recipient or person who made the expenditure of such funds has initiated a new candidacy or committee. **Surplus funds may only be expended for a new candidacy if the candidate is seeking the same office sought at his or her last election.** Within fourteen days of the day such contribution is received or expenditure is made, such candidate or authorized committee shall file (a) a final report for the previous campaign as provided in RCW 42.17.080 and 42.17.090 and (b) a statement of organization and initial report for the new campaign as provided by RCW 42.17.040, 42.17.080 and 42.17.090. The surplus funds as of the last day of the election cycle may be carried forward to the new campaign, reported as one sum and listed as a contribution identified as "funds from previous campaign." **"Funds from previous campaign" carried forward by a candidate to his or her new campaign are not subject to contribution limits set forth in RCW 42.17.640**.

Rule 11 of the Seattle Elections Code Administrative Rules states that assets transferred from the committee of the former office to the campaign of the new office are not attributed to a contributor. The rule also states, consistent with PDC rules, that contributions can be transferred on a "last in first out" basis, though in this case the SEEC Executive Director is charged with the task of preparing the list of contributors eligible for transfer.

> B. Contributor's Permission Required to Transfer Surplus. A candidate must, in writing, ask sufficient contributors who are eligible pursuant to Rule 11.C below, to sign a grant of permission to transfer the funds or assets from the committee for the former office to a committee for an identified new office. The contributors who must grant permission for transfer of funds or assets are those contributors identified pursuant to Rule 11.C whose listed contributions equal the amount of the surplus funds or fair market value of assets to be transferred. **A transferred asset is not attributed to a contributor; it is transferred from the old committee**.
>
> C. Transferring surplus funds or assets.
>
> 1. The Executive Director will prepare a list of contributors who may give permission to have their contributions transferred from one candidate committee to the same candidate's committee for a different office. The Executive Director shall assume the first contributions received were the first contributions spent.
>
> 2. The Executive Director shall create a list of contributors, beginning with the most recent contributions to the candidate's committee and working backwards chronologically until the aggregate of those contributors' contributions equals the amount of funds and assets at their fair market value on hand. If a contributor does not grant permission to have his contribution transferred, the committee may not solicit a different contributor for permission unless that contributor is already on the list provided by the Executive Director and contributed funds that remain available to be transferred.

It seems clear to me that Rule 11 states that transferred contributions are not subject to contribution limits to the new office, yet SEEC staff has indicated to me that they have always given the opinion that transfers are subject to limits.

In discussing this apparent inconsistency with PDC staff, I have not been given any election rules that would override SEEC Rule 11. Instead, it was explained that Rule 11 was interpreted by staff that its purpose was to make it convenient for a candidate to solicit the transfer of a donation without the donor having to be refunded and then to write a check to the new campaign. This does not seem consistent with the rule itself which states that transfers are not attributed to the original contributor.

I appreciate your assistance in clarifying this issue. I believe that the public would be well served by a formal opinion of the Commission.

Thank you for your consideration. Please contact me if you have questions or require additional information.

Philip Lloyd, President

Christine 0. Gregoire

ATTORNEY GENERAL OF WASHINGTON

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MEMORANDUM

August 28, 1995

TO: Members, Public Disclosure Commission

FROM: Roselyn Marcus, Assistant Attorney General

SUBJECT: Issues Relating to Surplus Funds

Because of the changes made to Chapter 42.17 RCW by ESSB 5684, several questions have arisen surrounding surplus funds. This memorandum seeks to answer these questions.

1. Question: Do surplus funds cease to be surplus when carried forward to a new campaign?

Answer: Yes, surplus funds cease to be surplus when carried forward to a new campaign. Surplus funds is defined in RCW 42.17.020(41) as the balance of contributions that remain in the possession or control of the candidate or political committee subsequent to the election for which the contributions were received, and that are in excess of the amount necessary to pay remaining debts incurred prior to that election. Therefore, after an election, once all debts are paid, the remaining balance is considered surplus. The disposal of surplus funds is governed by RCW 42.17.095. Surplus funds can used in a future election campaign, RCW 42.17.790. Surplus funds deposited in the new campaign account is a "contribution" to the new campaign and must be reported on the new campaign's disclosure forms. As a contribution (or seed money) for the new campaign, the funds constitute active campaign funds which then must be reported and spent pursuant to RCW 42.17.040 - .135 and are no longer considered surplus.

2. Question: If surplus funds are not transferred to a new campaign, nor otherwise disposed of according to RCW 42.17.095, what can or should be done with the surplus?

Answer: If the surplus funds are not disposed of pursuant to RCW 42.17.095, then the funds should be left in the separate account. This account is subject to separate reporting of its activities. These funds should not be commingled with any other funds. The separation should be real, not just on paper.

The funds could also be transferred to a new "surplus funds account", which would only include surplus funds. Once transferred to a "surplus funds account", these funds can only be disposed of pursuant to RCW 42.17.095(7).

3. Question: For winners in a primary election, when do primary surplus funds cease to be surplus?

Answer: If primary contributions are kept in the same account as general election contribution, then I support the following recommendation of staff:

> Primary surplus funds at the time that, following the primary election, 1) the campaign deposits general election contributions into the same account as the primary surplus, or 2) the campaign makes general election expenditures from this same account (including orders placed), whichever comes first.

Prior to that date, the candidate may:

a. transfer all or part of the primary surplus funds to a surplus funds account; or
b. leave the primary surplus in the same account as the general contributions, thereby making them active general election campaign funds; or
c. set up a separate general election campaign account and leave the primary surplus in the separate primary election campaign account, thereby limiting its use to that which is set forth in RCW 42.17.095.

If primary contributions have been kept in a separate account from any general election contributions from the start, then after the primary election, the winning candidate may follow option a or otherwise dispose of the funds pursuant to RCW 42.17.095.

4. Question: May a candidate use surplus funds from one election for a future election for a different office?

Answer: Yes, a candidate may use surplus funds from one election for a future election for a different office if the candidate has received written permission from the contributor. Confusion has arisen because of the amendment to RCW 42.17.790. The surplus funds statute states that surplus funds can be transferred to a new campaign if the new campaign is for the office last sought by the candidate. This section remains unchanged.

RCW 42.17.790 previously allowed only active campaign funds collected for an election to one office to be used for a different office upon the written consent of the contributors. This

section has been amended to now allow both active and surplus campaign funds to be used for a future election campaign for a different office upon written consent of the contributors.

In reading these two statutes together, thereby giving both meaning, surplus funds can be used for a future election for the same office last sought without receiving any written permission from the contributors. However, if surplus is to be used for a new campaign for a different office than the one last sought, it can be done, but only upon the receipt of written permission from the contributors of the remaining funds.

5. Question: When surplus funds are transferred to a new campaign, are they subject to the contribution limits?

Answer: No, the surplus funds are transferred in one lump sum as surplus funds without attribution to original contributors. The scheme of Initiative 134 is to allow all contributors the ability to contribute up to a certain limit for the primary, general and special election. Once the contribution is counted against the contributor's limit for that election, it should not be counted against a subsequent limit for a new election. To do otherwise would be to double count one contribution.

I have attached RCW 42.17.095 and RCW 42.17.790, as amended by ESSB 5684, for ease of reference. I hope these answers are helpful to you in dealing with surplus funds. If you have any questions or wish to discuss this further, do not hesitate to ask.

Roselyn

ROSELYN MA' CUS
Assistant Attorney General
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:RM

- Election Code Administration
- Seattle Hearing Examiner
- Business Tax Rules
- Taxicab and For-Hire Vehicles
- Public Corporations

Seattle Elections Code Administrative Rules

Information retrieved December 29, 2011 3:14 PM

Rule 11 Winding up a Campaign

A. Disposition of Surplus Funds and Assets. The final C-4 must show the disposition of any surplus, or debt, and any capital asset for which the campaign paid $200 or more, or an in-kind contribution valued at $200 or more, on a Schedule A, Schedule L or C-3, as appropriate. If the campaign disposes of such capital assets, it shall attach to the C-4 for the period a note describing the asset, date of purchase and name and address of the person or new political committee to which the asset is being transferred. The final report must show a zero balance.

B. Contributor's Permission Required to Transfer Surplus. A candidate must, in writing, ask sufficient contributors who are eligible pursuant to Rule 11.C below, to sign a grant of permission to transfer the funds or assets from the committee for the former office to a committee for an identified new office. The contributors who must grant permission for transfer of funds or assets are those contributors identified pursuant to Rule 11.C whose listed contributions equal the amount of the surplus funds or fair market value of assets to be transferred. A transferred asset is not attributed to a contributor; it is transferred from the old committee.

C. Transferring surplus funds or assets.

1. The Executive Director will prepare a list of contributors who may give permission to have their contributions transferred from one candidate committee to the same candidate's committee for a different office. The Executive Director shall assume the first contributions received were the first contributions spent.

2. The Executive Director shall create a list of contributors, beginning with the most recent contributions to the candidate's committee and working backwards chronologically until the aggregate of those contributors' contributions equals the amount of funds and assets at their fair market value on hand. If a contributor does not grant permission to have his contribution transferred, the committee may not solicit a different contributor for permission unless that contributor is already on the list provided by the Executive Director and contributed funds that remain available to be transferred.

D. Disposing of Campaign Debt. A candidate committee with a debt may dispose of the debt, and then file a final report, in the following ways: (a) by receiving sufficient contributions to pay the debt; (b) by transferring the debt to a new campaign for the same office; (c) by obtaining agreement from the creditors to forgive the debt (such forgiveness is considered a contribution and contribution limits apply); or (d) by the candidate personally assuming any campaign debt and reporting such assumption as a contribution to his or her campaign.

E. Transferring Debt. Candidate, ballot issue, and independent expenditure committees may transfer loans, debts and other obligations to a new campaign for the same office or the same issue and the new campaign may assume such loans, debts or obligations. The following reporting rules shall apply to such a transfer and assumption:

1. Transferring Loans. The transferring committee shall report the transfer of a loan by filing a Schedule L with its final report that reports the loan as forgiven on line 3 of Schedule L. The transferring committee shall also file an amendment to the original C-3 reporting receipt of the loan. This amendment shall change the name of the lender from the name of the original lender, to the name of the new committee to which the loan is being transferred. In addition to the name of the new committee, this report shall include the new committee's address. Where the new committee is a candidate committee, the amendment shall also include the year in which the new committee's candidate will appear on the ballot. Where the new committee is a ballot issue committee, the amendment shall also include the word "new" after the committee name. Where the new committee is a continuing political committee, the amendment shall also include the word "continuing" after the committee name. The new committee shall report assumption of the loan by including a Schedule B with its initial C-4. It shall report the loan on line 3. Under "Vendor's/Recipient's Name and Address," the new committee shall report the name of the person who originally made the loan to the transferring committee.

2. Transferring Other Debts or Obligations. The transferring committee shall include a note with its final report reporting that the debt or obligation has been transferred to the new committee, including the name and address of the new committee, the year in which the new committee's candidate or ballot issue will appear on the ballot, the name and address of the vendor, a description of the obligation, and the amount owed. The new committee shall report assumption of the debt or obligation by filing a Schedule B with its initial C-4 and reporting the debt or obligation on line 3.

Memo

To: Commissioners

From: Wayne Barnett

Date: December 29, 2011

Re: Transfers and the Contribution Limit

ANALYSIS

Relevant code language

SMC 2.04.010 defines "person" as an individual, partnership, joint venture, public or private corporation, association, federal, state or local government entity or agency however constituted, candidate, committee, **political committee**, continuing political committee, political party…." (Emphasis added.)

SMC 2.04.010 defines "contribution" to mean "a loan, loan guarantee, gift, deposit, subscription, forgiveness of indebtedness, donation, advance, pledge, payment, **transfer of funds between political committees**…." (Emphasis added.)

SMC 2.04.370.B states that "[n]o person shall contribute more than $600 to any candidate for Mayor, member of the City Council, or City Attorney of the city, in any election cycle." The contribution limit has been adjusted for inflation, and now stands at $700.

SMC 2.04.375.B sets forth the different ways committees may dispose of surplus campaign funds. Paragraph 6 provides that committees may "[h]old the cash surplus in the campaign depository…for possible use in a future election campaign for the same office last sought by the candidate…." Paragraph 9 provides that:

> "With the written approval of the contributor, a candidate or the candidate's political committee may use or permit the use of contributions, whether or not surplus, solicited for or received by the candidate or the candidate's political committee from that contributor to further the candidacy of the individual for an office other than the office designated on the statement of organization. If the contributor does not approve the use of his or her contribution to further the candidacy of the individual for an office other than the office designated on the statement of organization at the time of the contribution, the contribution must be considered surplus funds and disposed of in accordance with this chapter.

Policy considerations underlying contribution limits

The Supreme Court in *Buckley v. Valeo*, 464 U.S. 1 (1976) upheld Congress's right to impose campaign contribution limits, writing that they served a "sufficiently important [government] interest", namely "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25. The Court also wrote that a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since **the expression rests solely on the undifferentiated, symbolic act of contributing**." Id. at 21. (Emphasis added.)

I am aware of only one case in which a court struck down a contribution limit. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the Supreme Court, for a variety of reasons, chief among them the concern that the "contribution limits [we]re so low that they may pose a significant obstacle to candidates in competitive elections," held Vermont's contribution limit unconstitutional.

DISCUSSION

Staff has long advised that the contribution limit applies to transfers between two committees for different offices. (Ms. Grow found a 1997 communication to that effect between this office and the late Charlie Chong.) When making such a transfer, the law requires that a committee ask the contributor's permission. When given, that permission stands as the expression of support for a candidate that the Supreme Court has recognized as entitled to protection under the First Amendment. The campaign finance reports filed with our office by Dwight Pelz's 2005 City Council campaign list the names of the contributors who assented to the transfer from his County Council campaign committee.

At the same time, applying the contribution limit serves the important government interest in fighting corruption and the appearance of corruption. Since election cycles overlap, it is possible for a candidate to have two committees for two different offices open at once. Unless the contribution limit applies to transfers between two committees, an individual with an interest in City legislation could make maximum contributions to an elected official's two committees simultaneously, and later assent to the transfer of funds.

Staff's advice is not inconsistent with Rule 11, which deals with transfers of funds ***or*** assets. The sentence that Mr. Lloyd highlights in his request for an opinion – "A transferred asset is not attributed to a contributor; it is transferred from the old committee." – refers explicitly to *assets*, not funds. All that sentence means is that there is no need to assign the value of office equipment, yard sign posts, etc., to an individual contributor. Transferred *funds* have long been treated differently.