

Opinion Withdrawn – Wisconsin Ethics Commission – 12/06/2016

Summary:

Voluntary committees; public financing: Establishment and operation of voluntary committees; guidelines for distinguishing between contributions and independent expenditures of voluntary committees; prohibition on candidate contributions to voluntary committees acting on his or her behalf; permissibility of such contributions to non-voluntary committees acting in support of the candidate; use of public grant. §§11.12 (1), 11.16 (1), 11.10, 11.06 (7), 11.31, 11.26, Stats.; GAB 1.42, Wis. Adm. Code. (Issued to Cloyd Porter, June 22, 1978)

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was revised to reflect changes in GAB 1.42(6), Wis. Adm. Code, which specifies the criteria for evaluating the independence of an expenditure. The opinion below was reaffirmed by the Government Accountability Board on March 26, 2008 and fully incorporates the revisions directed by the G.A.B.

Opinion:

You have requested a formal opinion of the Elections Board on a number of questions related to the activities of voluntary committees and public financing of state candidates. Each is answered in order below:

1. First, you ask whether a committee formed independently of a candidate who accepts public funding can raise and spend funds on his or her behalf.

Normally a political committee (other than a personal campaign committee) may not make independent expenditures on a candidate's behalf. The committee may support the candidate only through contributions to his or her personal campaign committee. However, the law permits the making of independent expenditures by "voluntary committees," formed independently of the encouragement, direction or control of a candidate or the candidate's agents. §§11.12 (1), 11.01 (21), Stats. A committee which meets this requirement and wishes to make independent expenditures on behalf of a candidate (in addition to or instead of contributions to the candidate) must first file a voluntary oath, affirming its independent status. The form of that oath is set out in §11.06 (7), Stats., and can be obtained from the Elections Board (Form EB-6). Once the voluntary oath is filed, the committee is permitted to make unlimited independent expenditures on a candidate's behalf, whether or not the candidate will receive or has received a public financing grant.

2. Second, you ask how a voluntary committee making independent expenditures on behalf of a candidate should be established and operate.

As indicated above, the committee must be established without the encouragement, direction or control of the candidate or the candidate's agents, and must file an oath affirming its voluntary status. GAB 1.42, Wis. Adm. Code, sets out the regulations applicable to the committee's operations. Generally, the committee must treat and report as "contributions" to the candidate all

expenditures made with the encouragement, direction or control of the candidate or the candidate's agents. Expenditures made independently of such encouragement, direction or control are reported as "disbursements," with the candidate on whose behalf the disbursement is made clearly identified on reports. (As indicated above, these independent expenditures are unlimited.) Finally, a voluntary committee may not accept any contribution with the "encouragement, direction or control" of a candidate or his or her agents.

3. Third, you ask whether a voluntary committee may use the candidate's name in its name and in advertising.

There is nothing in the law to prevent a voluntary committee from using the name of a candidate in its name or on its advertising. The Board notes that there are special identification requirements applicable to candidate advertisements taken out independently of a candidate or the candidate's agents, and that false statements about candidates are forbidden. See GAB 1.42 (4), Wis. Adm. Code, and §12.05, Stats.

4. Your fourth question relates to the degree of permissible interaction between a candidate and a voluntary committee acting on his behalf: What guidelines are used to determine whether a voluntary committee's expenditure or expenditures are actually made independently of the candidate's encouragement, direction or control?

This question is a very significant one. As noted above, a voluntary committee's independent expenditures --those not made in cooperation or consultation with any candidate candidate's agent - -are unlimited, while the committee's contributions to the candidate are subject to limits.

To distinguish between a contribution and independent expenditure, the Board has promulgated GAB 1.42(6) Wis. Adm. Code, which reads as follows:

GAB 1.42(6)(a)

(a) Any expenditure made on behalf of a candidate will be presumed to be made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed and treated as an in-kind contribution if:

GAB 1.42(6)(a)1.

1. It is made as a result of a decision in which any of the following persons take part:

GAB 1.42(6)(a)1.a.

a. A person who is authorized to raise funds for, to spend the campaign funds of or to incur obligations for the candidate's personal campaign committee;

GAB 1.42(6)(a)1.b.

b. An officer of the candidate's personal campaign committee;

GAB 1.42(6)(a)1.c.

c. A campaign worker who is reimbursed for expenses or compensated for work by the

candidate's personal campaign committee;

GAB 1.42(6)(a)1.d.

d. A volunteer who is operating in a position within a campaign organization that would make the person aware of campaign needs and useful expenditures; or

GAB 1.42(6)(a)2.

2. It is made to finance the distribution of any campaign materials prepared by the candidate's personal campaign committee or agents;

GAB 1.42(6)(b)

(b) The presumption in par. (a) may be rebutted by countervailing evidence that the expenditure is not made in cooperation or consultation with any candidate or agent or any authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed.

You also posed two examples of potential candidate interaction with a voluntary committee. The Board's response to those is as follows: First, the guidelines above indicate that a candidate should not provide photographs or any advertising material to a voluntary committee for use in ostensibly "independent expenditures" on his behalf. Second, because contributions to a voluntary committee should be raised without participation of supported candidates, a candidate should avoid appearance at the fund-raiser of a voluntary committee collecting money to support him.

5. In your fifth question, you ask whether, prior to accepting a public financing grant, a candidate can contribute funds to a voluntary committee acting on his or her behalf. Your sixth question is whether such a contribution can take place after a public financing grant is accepted.

There are two types of contributions to which these questions refer --contributions from the candidate's personal funds and contributions from the campaign funds of his or her personal campaign committee. In the opinion of the Board, neither can be made to a voluntary committee acting on the candidate's behalf, whether before or after a public financing grant is accepted.

First, a candidate's personal expenditure on behalf of his or her own candidacy can only be made through the candidate's registered campaign depository. §11.10, Stats. A contribution of personal funds directly to a voluntary committee acting on the candidate's behalf would violate this requirement.

Second, contributions from a candidate's personal funds or from his or her personal campaign committee to a voluntary committee acting on the candidate's behalf would be inconsistent with that part of the voluntary oath by which the voluntary committee swears that no contributions are accepted with the encouragement, direction or control of a candidate.

Finally, such contributions would provide a means for candidates and candidate committees to circumvent disbursement limits, because contributions from one registrant to another are excluded from the definition of a "disbursement." §11.01(6)(d)4., Stats.

6. Your final question is whether a candidate or personal campaign committee, after receipt of a public financing grant, may contribute to a non-voluntary committee supporting the candidate's election.

Section 11.50 (7) limits the use of a public financing grant to the "purchase of services from a communications medium or printer, ...office supplies and postage." Hence no part of a public grant could be used to make the contribution proposed above.

However, the Board believes that a candidate's personal campaign committee could use non-grant funds to contribute to a non-voluntary committee supporting the candidate. A non-voluntary committee is not required to make an oath that contributions are accepted without the encouragement, direction or control of the candidate or the candidate's agents. Also, because a non-voluntary committee could not make independent expenditures on the candidate's behalf, contributions from the candidate's committee could not be used to circumvent disbursement limits.