

Opinion Withdrawn – Wisconsin Ethics Commission – 12/06/2016

Summary:

Application for and uses of public finance grants: A candidate's own contributions count toward the threshold of individual seed money required for public financing eligibility. Grants may not be used to purchase services directly from a person or business who or which does not meet the statutory definitions of "printer" or "communications medium." Withdrawal of an application for a grant prior to the acceptance of a grant is permissible. Disbursements of a public financing applicant must be allocated between the primary and election according to the ultimate purpose of the disbursement. §§11.50, 11.01 (4) and (17), Stats. (Issued to Edward Jackamonis, June 22, 1978)

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on August 27, 2008.

Opinion:

You have asked a number of questions about the application of Chapter 107, Laws of 1977, the "Election Campaign Fund Act." Each will be answered in order.

1. First, you ask:

If a candidate makes a contribution to his own committee from personal funds or funds owned jointly with a spouse, do these contributions count toward the threshold for purposes of qualifying for a public grant?

Your question refers to the "seed money" of individual contributions which a candidate must collect in order to qualify for public financing. Each applicant for a public grant must collect a certain threshold—based on the office sought—of contributions of \$100 or less in the aggregate from different individuals between January 1 and the fall primary (for fall candidates) or July 1 and the spring primary (for spring candidates). §11.50 (2)(b)5., Stats.

The only qualification for the seed money is that it comes from "contributions of individuals," as distinguished from committee contributions. A candidate is an "individual" and it is the Board's opinion that contributions from personal funds or funds held jointly with a spouse will count toward the seed money thresholds. Also, the contributions of a spouse may count toward those thresholds.

2. Your second question is in two parts and concerns the scope of permissible uses of a public financing grant under §11.50 (7), Stats., providing that a grant "may be expended only for the purchase of services from a communications medium or printer, and for office supplies and postage."

As you point out, the terms "communications medium" and "printer" are specifically defined for use in chapter 11:

Definitions. As used in this chapter:

(4) 'Communications media' means newspapers, periodicals, commercial billboards and radio and television stations, including community antenna television stations.

(17) 'Printer' means any person who accepts work for printing, imprinting, lithographing, photolithographing, rotogravure, gravure, letter-press, mimeographing, stenciling, photostating, multilithing, multigraphing, steel die engraving, silkscreening or by any other means reproducing or manufacturing political advertisements or campaign devices of any kind, including but not limited to campaign literature, billboard advertising, special clothing, buttons, pens, stickers, banners and streamers, in support of or in opposition to any candidate, political party or referendum, whether or not a charge is assessed for such work; excepting candidates, committees, individuals and groups subject to a filing requirement under this chapter.

The first part of your question is as follows:

a. May grants be expended for 'projection' or 'preparation' costs charged by a communications medium as well as the costs of 'airing' the political advertisement?

The answer is "yes." The Board believes that advertisement "preparation" or "projection" by a communications medium as defined above is a "service from a communications medium" and may be purchased with a grant, consistent with §11.50 (7), Stats.

The second part of your question is as follows:

b. May grants be expended for 'production' or 'preparations' cost if the services are performed by someone who does not meet the definition of a 'communications media' or 'printer' contained in §11.01 (4)(17), Stats. For example, may grants be expended for the services of an independent public relations firm not directly affiliated with a communications medium, or a freelance photography or film service, or an artist who designs a campaign logo or brochure layout, if the service results in a product which is an integral part of services later purchased from a communications media or printer?

The language of §11.50 (7), Stats., is plain and unambiguous. Grant funds may only be used for the purchase of services from a communications medium or printer, and for office supplies and postage. The legislature has explicitly defined the terms "communications medium" and "printer." Grant funds may not be used to purchase services from one who does not fall within either of those definitions.

Apparently the narrow scope of permissible uses of grant funds was, in the judgment of the legislature, necessary to avoid misuse of funds. While one could argue that a broader scope of permissible uses would preserve that aim while allowing more flexibility, that judgment is for the legislature to make. The Board must apply the law as written.

The Board notes that the advertising services which may be purchased from a medium or printer with a grant may include the letting by the medium or printer of a subcontract for advertisement preparation to one falling outside the definitions in §§11.01 (4) and (17), Stats., provided that the

medium or printer regularly subcontracts with that person for such work. In this way, an independent advertising agency, or free-lance photographer, filmmaker or artist could participate in the preparation of an advertisement purchased with grant funds.

3. Your third question is:

May a candidate who has applied for a public finance grant withdraw his application at a later date, and thus be free from limits on disbursements and contributions from personal funds? If so, what procedure should the candidate follow to withdraw?

There is no prohibition in the statutes on withdrawal of application for a grant. The only potential obstacle to withdrawal is the oath by which each applicant attests that disbursement and personal contribution limits have been complied with and will continue to be complied with "at all times to which such limitations apply to his or her candidacy." §11.50 (2), Stats.

The language of the disbursement and personal contribution limits indicates that they are imposed only when one applies for, receives and accepts a grant. §§11.26 (10) and 11.31 (2), Stats. Further, §11.50 (10), Stats., indicates that the application oath is intended to be only "a precondition to receipt of a grant."

It appears that adherence to personal contribution and disbursement limits is not required of one who has not received and accepted a grant, except as a condition of eligibility for public financing. If a candidate who signs the oath with a legitimate belief that he/she will adhere to the limits subsequently decides to exceed the limits, he or she may do so without violating the campaign finance law, so long as no public grant is accepted.

Given that the application oath is not binding under the circumstances described above, the Board believes that the application may be withdrawn. There is no explicit statutory procedure for withdrawal, but the Board recommends that any candidate wishing to do so should submit to the Board a notarized statement of withdrawal as soon as a decision not to seek public financing is made. The candidate will then be withdrawn from the list of those whose eligibility for public financing is determined by the Board after the primary, per §7.08, Stats.

Finally, the Board notes that if, at the time the candidate signs the oath, he or she has already exceeded the disbursement or personal contribution limits or the candidate intends to exceed the limits (and such intent can be proved), he or she may be liable for filing a false campaign finance statement and false swearing. §§11.27 (1) and 946.32, Stats.

4. Your next question is divided into two parts. The first reads:

4. Form EB-24, Report on Use of Grant:

a. This form requires that a candidate separate disbursements between the primary and general election. Although S. 11.31 (5) provides some direction on this point, how is a candidate to determine to which election limit a disbursement applies? For example, prior to the primary, a candidate purchases and receives campaign literature (bumper stickers, yard signs) which will be used and/or distributed in both the primary and the general

election. How should the candidate apportion the costs between the primary and general election?

By providing separate disbursement limits for the primary and election, §11.31, Stats., requires a public financing applicant to allocate disbursements between the two. Section 11.31 (5) indicates that disbursements for goods to be delivered or services to be performed after the date of the primary count against election limits, regardless of the time of disbursement. However, the statutes are silent on the allocation of other disbursements, such as disbursements for goods delivered before the primary but used during both the primary and election, and disbursements for services rendered before the primary but directed toward the primary and election.

In the Board's opinion, the proper criterion for allocating a disbursement on the EB-24 form is the ultimate purpose of the disbursement: Is it intended to influence the primary, the election or both? §§11.31, 11.01 (16), Stats. Also, see El. Bd. Op. 78-3.

The following general guidelines are based on that criterion:

Disbursements for goods delivered and distributed before the primary, but used during both the primary and election—such as bumper stickers, car-top carriers and posters—are presumed to be allocated on a percentage of use basis. Disbursements for goods delivered prior to the primary but, not distributed until after the primary are presumed to be intended for the election and should be so allocated. Disbursements for goods which are clearly related to only the primary should be counted toward the primary.

Payment for services rendered prior to the date of the primary should generally be allocated to the primary.

These guidelines are not absolute. If a candidate can demonstrate that a particular disbursement may be reasonably allocated otherwise, using the criterion described above, that allocation will be accepted by the Board.

The second part of this question relates to the use of a grant "to make an expenditure prior to the primary." Grants are not distributed to candidates until after the primary. §§11.50 (5), 7.08 (2)(c), Stats. Accordingly, the question of whether a grant may be used for expenditures prior to the primary does not arise.

The Board notes that §11.50 (11)(a), Stats., provides in part: "no grant may be utilized in any primary..." Presumably that statute means to prevent the use of grants to defray expenses incurred for primary purposes; use of grant is limited to influencing an election.