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OPINION NO. 2000-03

TO: Janice L. Graziano, City Clerk
FROM: Stephen M. Kemp, City Attorney
DATE: December 28, 2000
SUBJECT: Use of Campaign Funds for Arguments

QUESTION:

1. Is it a legal expenditure of campaign funds for a candidate or a committee that is active to use such funds to pay the deposit and cost of submitting an argument on an initiative or referendum in a related or unrelated campaign?
2. Does it make a difference whether the committee has terminated and the funds are surplus?
3. Is payment of the costs a permitted expense for a labor union or corporation.

OPINION:

This opinion asks for clarification of our previous opinion, No. 2000-02 that addressed Question No. 2 above. Therefore Question 2 will be addressed first and then Question 1.

There are two types of Campaign Committees. Active Campaign Committees are required to report expenditures based on a defined schedule and are limited to making expenditures. Terminated Campaign Committees are those that have filed or will be filing a termination statement in accordance with A.R.S. §16-914 and have completed making all expenditures and extinguished all of its debts, as defined in A.R.S. §16-901.24.

It is our opinion that A.R.S. §16-915.01 does not prevent a Campaign Committee that is planning to terminate from spending its surplus funds for a contribution to an initiative or referendum campaign by paying for the deposit with surplus funds as that term is defined in A.R.S. §16-901.24 and pursuant to A.R.S. §16-915.01.A.7. To interpret otherwise would be to impose a requirement that permits corporations and labor unions to exercise first amendment rights to

contribute to campaigns by paying for arguments on other initiatives and referendums terminated committees having excess funds could not. Such a distinction restricts the exercise of free speech guaranteed under the First and Fourteenth Amendments to the United States Constitution and is subject to a strict scrutiny analysis. Stone v. City of Prescott, 173 F.3d 1172 (9th Cir. 1999); cert. den. 120 S.Ct. 170; Ruiz v. Hull, 191 Ariz. 441, 957 P.2d 984 (1998) cert.den. 119 S.Ct. 850.

Under the strict scrutiny analysis, the State must have a compelling state interest in order to regulate first amendment expression. Absent such a compelling state interest, such regulations are unconstitutional. In this matter, the question exists that there exists no specific authority allowing terminated committees to expend surplus monies on arguments, although such committees could turn the money over to political committees that could make such expenditures.

At the same time the statute expressly provides that the monies may be disposed of in any lawful manner. As with a court, it is our duty to apply the statute in a constitutional manner, if possible. Masayesva for and on behalf of Hopi Indian Tribe v. Hale, 118 F.3d 1371 (9th Cir. 1997) cert den. Hale v. Secakuku, 118 S.Ct. 1048. A statute should only be declared unconstitutional if there is no lawful manner of applying it.

Submission of arguments on initiatives and referendums and expenditure of funds to pay for such costs of submission is clearly protected First Amendment activity. The state can not grant corporations, labor unions and individuals the right to exercise the first amendment either separately or jointly, while providing that a group of individuals previously associated in a campaign committee may not use their surplus funds for such a purpose. To do so, would likely violate the equal protection clause of the Fourteenth Amendment as well. Therefore it remains the opinion of this Office that under A.R.S. §16-915.A.7, a Campaign Committee that has or is planning to terminate may use surplus funds to pay for an argument on an initiative or referendum in a City of Peoria election.

Regarding Question 1, the starting place for the analysis is A.R.S. §16-915, which outlines the contents of campaign finance reports. Subsection A uses two terms "Expenditures" and "Disbursements". Only one of these terms, "Expenditures" is defined in A.R.S. §16-901. The relevant portions of A.R.S. §16-915.A.4 provide as follows:

4. For the reporting period and the election, the total amount of all disbursements and an itemized list of all disbursements in the following categories together with the total of all disbursements in each category:

- (a) Expenditures, other than a contract, promise or agreement to make an expenditure resulting in an extension of credit, made to meet committee operating expenses.
- (b) Transfers to other political committees.
- (c) For a candidate's campaign committee, the repayment of loans made or guaranteed by the candidate.
- (d) Repayment of all other loans.
- (e) Refunds of contributions received and other offsets to contributions.
- (f) Loans made by the reporting political committee.
- (g) The value of in-kind contributions received.
- (h) Independent expenditures together with the information required pursuant to subsection F.
- (i) Any other disbursements.

Considering the provisions of subsection 4 as a whole, which is required under the rules of statutory interpretation, it would appear that "other disbursements" is a category of expenditure that is not specifically itemized under items (a) through (h) in the subsection. Clearly payment of costs for an argument would appear to fall within the catchall provision of (i), except for the language in A.R.S. §16-901 which defines expenditures and specifically provides that payment for costs of an argument is not an expenditure. A.R.S. §16-901 provides in part as follows:

8. "Expenditures" includes any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by a person for the purpose of influencing an election in this state including supporting or opposing the recall of a public officer or supporting or opposing the circulation of a petition for a ballot measure, question or proposition or the recall of a public officer and a contract, promise or agreement to make an expenditure resulting in an extension of credit and the value of any in-kind contribution received. Expenditure does not include any of the following:

- (a) A news story, commentary or editorial distributed through the facilities of any telecommunications system, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by a political committee, political party or candidate.
- (b) Nonpartisan activity designed to encourage individuals to vote or to register to vote.
- (c) The payment by a political party of the costs of preparation, display, mailing or other distribution incurred by the party with respect to any printed slate card, sample ballot or other printed listing of three or more candidates for any public office for which an election is held, except that this subdivision does not apply to costs incurred by the party with respect

to a display of any listing of candidates made on any telecommunications system or in newspapers, magazines or similar types of general public political advertising.

(d) The payment by a political party of the costs of campaign materials, including pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs, used by the party in connection with volunteer activities on behalf of any nominee of the party or the payment by a state or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by the committee if the payments are not for the costs of campaign materials or activities used in connection with any telecommunications system, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising.

(e) Any deposit or other payment filed with the secretary of state or any other similar officer to pay any portion of the cost of printing an argument in a publicity pamphlet advocating or opposing a ballot measure.

At first blush, it would appear that A.R.S. §16-901.8 and §16-915.A.4 are in conflict. Again, under the rules of statutory interpretation, we are required to interpret the statute in such a manner as to give effect to both provisions, unless it is impossible to do so. Chaparral Development v. RMED Intern., Inc., 170 Ariz. 309, 823 P.2D 1317 (App. 1991) rev.den.

In this case it is possible to give effect to both of these apparently conflicting statutes. Subsection (i) of A.R.S. §16-915.A.4 referring to any other disbursements is referring to other items that are expenditures for a campaign, but not specifically listed. This subsection is not met to include items that are not expenditures under A.R.S. §16-901 and such items can not be reported under this provision.

Based on this analysis, the question then becomes, whether an active campaign may use contributions received for payments of costs other than an expenditure as defined in A.R.S. §16-901 and §16-915, including payment of costs for submission of an argument in a related or unrelated initiative or referendum campaign.

We hold that it may not use contributions received for payment of expenses other than defined expenditures. The entire purpose of the enactment of A.R.S. §§16-901, et.seq. was to provide a comprehensive plan for the regulation of campaign financing on both elections for offices and the exercise of the legislative power. See, Ariz. Atty.Gen. Op. I87-039 (1987). Clearly, while such regulation always

raises First Amendment concerns; it is well established that it is within the power of the state to regulate. Federal Election Com'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 107 S.Ct. 616 (1986)

Unlike a terminated committee, which is disposing of its funds, the state has a more compelling interest in the regulation of active campaign committees. Ariz. Atty. Gen. Op. I87-039. The state's regulatory scheme does not prevent the exercise of First Amendment speech rights, but provides only for disclosure of parties contributing funds or expending funds in such matters. There is no basis to find that the statutory scheme which requires disclosure of such payments is impermissible. Arizona Socialist Workers Campaign Committee v. Culbertson, 756 F.2d 1439 (9th Cir. 1985).

This leaves the issue of rationalizing the exclusion of the costs of arguments as an expenditure with the fact that an active campaign committee must report all payments made from contributions, including expenses for payment of costs for arguments on initiatives and referendums. The law on its face would appear to exclude these as expenditures and by implication prohibit use of funds for such purposes. However to construe the law in such fashion would infringe on protected First Amendment speech and association rights. FEC v. National Conservative PAC, 470 U.S. 480, 105 S.Ct. 1459 (1985) where the United States Supreme Court held that Political Action Committees have full First Amendment Rights. Further such a construction of the law would leave it open to direct attack on constitutional grounds based on the decision of the United States Supreme Court in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976) holding that direct bans on direct contributions implicates First Amendment interests. As noted above, the law must be construed if at all possible in such a manner as to uphold its constitutionality. In this case, it is our opinion that while payment of costs for arguments are not an expenditure for purposes of campaign finance, they are a disbursement that may be made and must be reported.

Therefore it is the conclusion of this office that an active campaign committee may only make payments of contributions received for items defined as expenditures and disbursements under A.R.S. §16-901.8 and §16-915.A.4. While payment for the costs of an argument on a legislative matter being submitted to the voters is specifically exempted from being an expenditure, we hold that it is a disbursement for which use of contributions received by an active campaign committee if expended is a disbursement that must be reported.

Separate statutory authority exists for certain expenditures by corporations and labor organizations. At the outset, expenditures under the specific statute in A.R.S. §16-920 is broader than the term defined in A.R.S. §16-901. This statute was designed to provide a specific exemption from restrictions on corporations and labor unions in the campaign finance process. Under A.R.S. §16-920.A.4 a

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corporation or labor union may make expenditures to support or oppose an initiative or referendum matter, without such expenditures being a contribution under the campaign finance laws. Certainly, indicating support or opposition to a measure by paying the cost of the argument in the publicity pamphlet is an expenditure to support or oppose. As such, a corporation or labor union may pay with their funds the cost of an argument to support or oppose an initiative or referendum.

If you should have any further questions, please let me know.