

STATE ETHICS COMMISSION
ADVISORY OPINION
S.E.C. 2008-03

August 28, 2008

Concerning the refunding of contributions made to a candidate for the same office throughout the course of multiple election cycles and how previous contributors may be solicited by the same candidate for a campaign for a different office.

ADVISORY OPINION:

QUESTION ONE

Whether a candidate may refund a contributor the cumulative amount contributed to the candidate's campaigns for the same elective office throughout multiple election cycles, or if the contributor may only be refunded up to the amount of the cumulative contributions made in the current election cycle.

The Ethics in Government Act (Act) addresses the disposition of contributions remaining in excess of those necessary to defray ordinary and necessary expenses and is not restricted to contributions received within the current or latest election cycle. O.C.G.A. § 21-5-33(b). Contributions remaining in excess may be transferred "without limitation to persons making such contributions, not to exceed the total amount cumulatively contributed by each such transferee." O.C.G.A. § 21-5-33(b)(1)(C). Therefore, if contributions were made by a contributor to a candidate's campaign for the same elective office throughout multiple election cycles, then a candidate may refund the contributor up to the total aggregated amount contributed. However, interest shall not be assessed when refunding any contributions that are not either loans made by the candidate or the candidate's family member, or bona fide loans made by a state or federally chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation. See O.C.G.A. § 21-5-41(g) & (i).

In addition, if any of the election cycles for the same elective office consisted of elections that did not occur or the candidate did not qualify, then any contributions received during these election cycles, if unexpended, must be refunded on a pro rata basis without interest. See O.C.G.A. § 21-5-43(d).

Finally, if the elective office's designation was changed at some point (due to redistricting, for example), so long as the campaign receiving contributions subsequent to the re-designation is for the seat that succeeds the re-designated seat then the successor seat is considered to be the same elective office.

QUESTION TWO

Whether a candidate who wishes to refund contributors for their previous contributions for one particular office may solicit these same contributors for contributions to the candidate's campaign for a different office.

Question 2 of the advisory opinion suggests three options for consideration by the Commission. These options have been summarized and paraphrased herein. Option 1(a) of Question 2 asks whether a refunded check of a contribution made to a candidate for a campaign for Office A may be indorsed by the contributor and then transferred by the contributor to the candidate's campaign for Office B. Because the Act stipulates that contributions may be used for future campaigns only for that elective office for which they were received, the issue presented by Option 1(a) is whether a candidate for Office B may accept transfer of an indorsed check from a contributor if the drawee of said check is Campaign A. Georgia's Uniform Commercial Code defines "drawee" as the person ordered to make payment on a negotiable instrument and the "drawer" as the person ordering payment on the negotiable instrument. O.C.G.A. § 11-3-103(a)(2) & (3).

A negotiable instrument is defined as being either an order instrument or a bearer instrument. O.C.G.A. § 11-3-104(a). This advisory opinion is limited to refunds made via order instruments and not to refunds made via bearer instruments. Checks and money orders are order instruments. An order instrument is made "to order" and can be indorsed over to a third party. O.C.G.A. § 11-3-104(a)(1), (c) & (f). One of the four methods of executing a transfer is by indorsement. *Black's Law Dictionary* 1535 (Bryan A. Gardner ed., 8th ed. West 2004). If Campaign A delivers a refund check to a contributor and the contributor subsequently indorses the refund check over to Campaign B and delivers the check to Campaign B, then the contributor has executed a transfer of the refund check from the contributor to Campaign B. See O.C.G.A. § 11-3-203. Because the transfer ran from the contributor to Campaign B and not from Campaign A to Campaign B, no violation of O.C.G.A. § 21-5-33(b) has occurred. Therefore, a contributor must indorse a refund check to Campaign B in order for Campaign B to be able to become the payee of the check without violating O.C.G.A. § 21-5-33(b). To this extent, Option 1(a) complies with the requirements of O.C.G.A. § 21-5-33(b).

Option 1(b) of Question 2 asks whether Campaign A may mail a refund check to contributors and Campaign B may mail a separate solicitation requesting a contribution written on a new check. This option complies with the requirements of O.C.G.A. § 21-5-33(b).

Option 2 of Question 2 asks whether a candidate may mail refund checks from Campaign A and include in Campaign A's mailings solicitations to contribute to Campaign B. The Act defines a contribution to include "anything of value" and a

contribution other than a direct monetary contribution is considered an “in-kind contribution.” O.C.G.A. § 21-5-3(7); Rule 189-3-.07. The portion of any unpaid value of a mailing not paid by Campaign B is an in-kind contribution. Because contributions may be used for future campaigns only for that elective office for which they were received, if Campaign A paid the remaining portion of the value of the mailing then an in-kind contribution has been made by Campaign A to Campaign B. Therefore, a candidate may not apportion the cost of a mailing if the materials contained therein pertain to a candidate’s campaigns for different offices. Such apportionment would entail the respective making and receiving of in-kind contributions by said campaigns and therefore would violate O.C.G.A. § 21-5-33(b).

Option 3 of Question 2 asks whether Campaign A may offer a contributor a choice of receiving a refund of his previous contribution(s) to Campaign A or of authorizing Campaign A to treat the contribution(s) to Campaign A as a contribution from the contributor to Campaign B. Such authorization by the contributor, if acted upon by Campaign B, would constitute a violation of O.C.G.A. § 21-5-33(b).

CONCLUSION

First, a campaign may refund the cumulative amount of contributions received from one contributor over multiple election cycles so long as the refund complies with this advisory opinion, the Act and Commission Rules. Second, the Act does not prohibit a campaign by the same candidate but for a different office from accepting an indorsed refund check from a contributor to a previous campaign for another elective office so long as such acceptance is in accordance with this advisory opinion, the Act and Commission Rules.

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