

- Transfers to a future campaign account for the same office (or different office subject to permission from the contributors).²

The restriction on permissible uses of surplus funds is important to ensure candidate campaign contributions are not raised and spent for personal benefit or other purposes incompatible with the purpose of the campaign finance and related laws.

Designation and Separation of Surplus Funds

Surplus funds are limited to “the balance of contributions that remain in the possession or control of [a] committee or candidate subsequent to the election for which the contributions were received, and that are in excess of the amount necessary to pay remaining debts or expenses incurred by the committee or candidate with respect to that election.”³ This definition includes two main criteria for the designation of surplus funds. First, a candidate may not designate contributions from a campaign as surplus funds until the election has ended.⁴ Second, surplus funds are limited to the amount of remaining contributions left over from the campaign after all outstanding debt and expenses have been determined. A candidate may not directly solicit or receive contributions as surplus. Furthermore, candidate may not designate any campaign funds as surplus while receiving contributions for the same election cycle.

Eligible surplus funds must be properly segregated from campaign funds in order to ensure the proper designation for authorized expenditures and to avoid the comingling of campaign funds for such uses. The clearest and most transparent method to segregate surplus funds is through the creation of a surplus funds account, separate from the campaign bank account, and used exclusively for the deposit and dispersal of surplus funds. A surplus funds account is required for the use of surplus funds to reimburse for a public office-related expense,⁵ though it can be used for any qualifying expenditure of surplus funds. A candidate must register the surplus funds account with the PDC and report the activity from the account much in the same way as a campaign account.⁶

Surplus funds also may be held in an existing campaign account and used for any qualifying expenditure, except reimbursement of public office-related expenses (which must be made from a surplus funds account). A candidate who chooses to keep surplus funds in the campaign account has the burden of accounting for surplus funds separately from any campaign funds in the account. The accounting may use any reasonable method that clearly identifies: (1) the initial and ongoing balance of remaining surplus funds, and (2) each specific expenditure for a qualifying use that is drawn from that total. The initial surplus funds balance must be designated within the account after the election has concluded and all outstanding debt and expenses of that

² RCW 42.17A.430.

³ RCW 42.17A.005(51).

⁴ “[I]t is obvious that surplus funds cannot exist ‘until after an election.’” Att’y Gen. Op. 1978 no. 24, at 6 (August 14, 1978).

⁵ RCW 42.17A.430(7).

⁶ See RCW 42.17A.205.

election have been determined. Once the initial surplus funds total from a campaign is identified, no other amount may be added to that total. A candidate may not borrow surplus funds for campaign purposes, and campaign funds may not be used to replace or replenish the surplus funds total.

If the surplus funds are designated from a primary campaign, those funds must be distinguished and accounted for separately from the active general election campaign funds. Surplus funds from the general election may be added to the surplus funds from the primary.

A campaign account may not be used for a surplus funds expenditure if the candidate fails to maintain an accounting of all surplus funds within an existing campaign account, effectively distinguished from campaign funds. In order to make a permissible expenditure of surplus funds from within the campaign account, the candidate will have the burden of showing: (1) sufficient surplus funds were available for each expenditure; (2) each surplus funds expenditure was drawn from available, properly designated, surplus funds; and (3) the remaining balance of surplus funds after each expenditure from available surplus funds.

Disposal of Surplus Funds for Non-Reimbursed Public Office Related Expenses

One of the permissible uses of designated surplus funds includes nonreimbursed public office-related expenses. A nonreimbursed public office-related expense includes “an expenditure incurred by an elected or appointed official, or a member of the official's immediate family, solely because of being an official.”⁷ As noted above, a candidate must create a separate surplus funds account in order to dispose of surplus funds for nonreimbursed office-related expenses.

The creation of a separate surplus funds account for public office-related expenses stems from a prior version of the law that permitted candidates to establish a “public office fund” account and raise funds directly to reimburse for public office-related expenses. Such funds were required to be deposited in a designated public office fund account, separate from a campaign account, and registered with the PDC.⁸ The enactment of the Fair Campaign Practices Act, Initiative 134 (1993),⁹ repealed the public office funds account, but required candidates to report any “gifts” received.¹⁰ Initiative 134 also removed permission for candidates to use surplus funds for nonreimbursed public office-related purposes.¹¹

The following year, the Legislature created the State Ethics Act, which provided a general prohibition on state officials and employees soliciting or accepting gifts, excluding campaign contributions and other permissible exceptions.¹² In addition to the

⁷ WAC 390-05-518.

⁸ RCW 42.17A.243 (repealed).

⁹ Laws of 1993, Ch. 2 sec. 35.

¹⁰ Id. at Ch. 2, sec. 31.

¹¹ Id. at Ch. 2, sec. 20.

¹² Laws of 195, Ch. 154 (codified at Chapter 42.52 RCW).

State Ethics Act, the legislature reinstated the permissive use of surplus campaign funds to pay for nonreimbursed public office-related expenses.¹³ The current law requires candidates to register a surplus funds account to draw funding for the reimbursement of public office-related expenses and disclose such expenditures to the PDC.¹⁴ Like the previous public office fund, the surplus funds account tracks public office-related expenses. However, a difference from the prior law is that candidates may not solicit, receive, or directly deposit contributions into the surplus funds account.

The permissible use of surplus funds to reimburse public office-related expenses occupies a narrow permission in law between the prohibition on campaign fund expenditures for personal use on one end, and the general state ethics prohibition on the acceptance of (non-campaign related) gifts on the other end.¹⁵ In light of this history, the exception must be read narrowly in the context of its intended scope.

Soon after enactment of I-134, the Attorney General's Office reasoned that nonreimbursed expenses cover situations where "(1) reimbursement from public funds is not available because of legal restrictions or the absence of funds appropriated for that purpose, or (2) reimbursement from public funds is legally available, but the officer has voluntarily declined to file a claim for reimbursement from the public treasury."¹⁶ In either case, the standard implies that an actual out-of-pocket expense has been incurred (and has not been reimbursed using public funds).¹⁷

A qualifying public office-related expense must be incurred "solely because of being an official," which excludes any expense incurred irrespective of the public office held.¹⁸ To prevent the use of public office for personal or private benefit,¹⁹ a public office-related expense must be used in furtherance of the duties of the office for which it is claimed. To the extent an expense has both a personal benefit and an office-related use, the reimbursement may be claimed only for the office-related part of the expense. If an expense incurred exclusively for an office-related use subsequently is converted to a personal use, the public official must repay the surplus funds account for the value of the converted use.

The following categories involve the areas under which most questions generally arise regarding the scope of permissible disposal of surplus funds for non-reimbursed office-

¹³ Laws of 1995, Ch. 397, sec. 31.

¹⁴ RCW 42.17A.430.

¹⁵ While the State Ethics Act only applies to state officials, the general intent of restricting personal gifts for public officials also applies to local officials in the context of limiting the use of surplus funds.

¹⁶ Att'y Gen. Op. 1993 no. 12 at (1993),

¹⁷ *See id.* ("[T]he regulatory definition necessarily implies an expenditure actually incurred in relation to a public office, and would exclude situations in which no out-of-pocket expenses have actually occurred.").

¹⁸ This is similar to the standard regarding the prohibited personal use of campaign funds. See WAC 390-16-238 (applying the prohibition on personal use of campaign funds (RCW 42.17A.445) if the expense "would exist irrespective of the candidate's election campaign.").

¹⁹ The State Ethics Act prohibits state officials and employees using public resources "for the private benefit or gain of the officer, employee, or another." RCW 42.52.160. The guidance adopted by the state ethics boards on the use of state resources provides helpful guidance on this issue to distinguish between office-related use and personal benefit.

related expenses. The guidance provided here does not provide authorized permission for any specific activities, and the burden remains on the candidate or public official to demonstrate an expense qualifies for reimbursement. A candidate or public official should contact the PDC regarding any questions about the circumstances of a particular issue.

Travel

Public office-related travel expenses may be paid or reimbursed using surplus funds to the extent incurred in relation to the office-related purpose of the travel. Generally, permissible reimbursable expenses will be limited to any applicable per diem rates used by the official's employer or jurisdiction. Additional expenses may be permitted for convenience, such as when a government hotel rate is not offered or available in the vicinity of an event, or when additional expenses are incurred to reduce travel time.

Nonessential expenses, such as upgrades, additional benefits, or extended travel beyond the office-related purpose, are considered personal and are not reimbursable. To the extent an expense exceeds the scope of the office-related purpose of the travel, surplus funds may reimburse the official only for the pro-rated portion of the expense necessary to cover the official portion for that activity.

Penalties, fines, legal expenses

Personal liabilities, such as penalties and fines assessed for a public official's personal actions while in office, are not incurred in furtherance of the duties of the office and may not be paid or reimbursed with surplus funds. Legal fees incurred for the defense against personal liabilities, or in support of personal interests, also may not be paid or reimbursed using surplus funds, unless the office of the official, or appropriate governing authority, is authorized to pay such expenses.

Membership/meetings

Membership fees or dues for social, civic, or political organizations are personal in nature, unless such membership is required for the public office. Membership status reflects a personal choice of association with an organization, which is not solely determined because of the office held. Often, membership bestows personal privileges (e.g. status, access, or other incentives) which provide a personal benefit to the member. The related meetings and activities of such organizations, including travel expenses, are personal expenses as well.

Expenses incurred to attend meetings of an organization may be reimbursed to the extent the official's attendance furthers the duties of the office. The mere invitation by an organization, by itself, does not determine the nexus of the office to an event, but rather, the subject and purpose of the meeting must have a function related to the official duties of office.

Meals and Entertainment

Personal meals are reimbursable as office-related expenses for meals that arise outside the office for duties within the scope of the office. For example, meals as part of a business meeting that includes lunch, or an organizational event that includes dinner, are deemed part of the related activity. The payment or reimbursement must follow any per diem requirements. Surplus funds are permitted to pay for occasional meals provided for the staff of a public official working extended hours or overtime.

Entertainment events, such as attendance at a concert or sporting event, or recreational activities, such as a golf outing, are presumed to have a personal benefit, and are not exclusively furthering the duties of the office. The fact that the duties of the office may be performed in conjunction with such an activity does not convert the personal benefit into a reimbursable office-related expense.

Personal Items and Services

Expenses for personal belongings, such as clothing and hygiene products, are personal in nature and incurred solely because of being an official. The purchase and care of a specific uniform required for public office, such as a sheriff or fire chief, may be office-related, however compliance with a dress code does not qualify a clothing expense as office-related. Personal care services, such as hygiene or healthcare, are personal in nature and not solely related to the office held.

Personal Safety

Safety risks may relate to service in public office, either directly targeted at an individual or collectively as a member of a targeted body, such as the legislature or local council. In order for a personal safety measures to be reimbursed as an office-related expense: (1) the risk must be identifiable and (2) the expense must be proportional to that risk.²⁰

A public official should consult with the appropriate law enforcement authority to evaluate and determine the nature of any risk to personal safety related to their office, as well as any recommended responsive measures. Such an assessment may come through direct communication with law enforcement or through a warning issued by law enforcement regarding the nature of the risk.

The safety measures employed must be proportional to the risk, which also may be established through the recommendations of law enforcement. The Commission will consider the evaluation of any risk to a particular public official based on the assessment of law enforcement, and may independently consult with law enforcement agencies regarding an assessment or recommendation.

²⁰ See generally Federal Elections Commission, Advisory Opinion 2017-07 (July 18, 2017); & FEC Advisory Opinion 2020-06 (January 22, 2021).