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May 26, 2022

Federal Election Commission
Office of General Counsel
1050 First Street, NE
Washington DC 20463

RECEIVED

By Office of General Counsel at 1:46 pm, May 26, 2022

RE: Advisory Opinion Request

RECEIVED

By Office of the Commission Secretary at 3:01 pm, May 31, 2022

Dear Commissioners and General Counsel:

I serve as counsel to Swalwell for Congress. On behalf of Congressman Swalwell and Swalwell for Congress, this letter requests an advisory opinion regarding the use of campaign funds to pay for childcare expenses incurred by a candidate.

Background

Congressman Swalwell currently represents California Congressional District 15 and is a candidate for California Congressional District 14 this year. Congressman Swalwell and his wife Brittany have three young children, all still in diapers, and they both work full time.

As part of his duties as a member of Congress, a candidate for re-election and prolific fundraiser for other democratic candidates, he often is expected to travel and be away from home, including overnight. As Co-Chair of the House Democratic Steering and Policy Committee (a party leadership position that can only be held by a Member of Congress), Congressman Swalwell's duties include getting more Democrats elected to Congress. Pursuant to prior advisory opinions, Congressman Swalwell often pays for childcare for the times he is conducting his own campaign activities locally using campaign funds when his spouse is unable to care for the children in his absence, as the FEC has previously advised is permissible.¹

Additionally, because of his status as a well-known member of Congress, he gets many invitations, including invitations from foreign governments for information gathering visits, that may require him and sometimes his spouse to be away for multiple days. To provide for care for the children, on some occasions the Swalwell family have enlisted the support of a night nanny, when both are unavailable to care for the children.

¹ See AO 2018-06 (Liuba for Congress) and AO 2019-13 (MJ for Texas).

Questions Presented

1. Pursuant to other Commission Advisory Opinions, Congressman Swalwell often uses campaign funds to pay for childcare while attending local campaign events. However, can Congressman Swalwell use campaign funds to pay for overnight childcare if he travels for campaign events for his campaign or other campaigns, if his spouse is not available to care for the children?
2. Can Swalwell for Congress pay for childcare expenses for his children if he travels at the request of foreign governments or other entities because of his status as a member of congress? If yes, would that include overnight care as well?

Discussion

Under the Act, a candidate's authorized committee may use its funds for several specific purposes. They are (1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; (3) contributions to organizations described in 26 U.S.C. 170(c); (4) transfers, without limitation, to national, State or local political party committees; (5) donations to State and local candidates subject to the provisions of State law; and (6) any other lawful purpose.²

However, an authorized committee may not convert campaign funds to "personal use."³ "Conversion to personal use" is defined as the use of campaign funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign."⁴ The Act and Commission regulations provide a list of expenses that are personal use. That list is non-exhaustive. For expenses that are not on that list, the Commission determines whether the expense is personal use on a case-by-case basis.

The Act and regulations do not explicitly reference childcare expenses, so the Commission must evaluate whether such expenses would exist irrespective of the candidate's campaign to determine whether it would be a permissible use of campaign funds.

The Commission has previously advised that childcare expenses are permissible. In Advisory Opinion 2018-06, the Commission concluded the candidate could use campaign funds to pay for such care to the extent that the expenses were a "direct result of campaign activity," because such expenses would not have existed but for the campaign. In Advisory Opinion 1995-42, the Commission concluded it was permissible for a candidate to use campaign funds to pay for occasional childcare costs because the expenses would have resulted only from campaign activity and would not otherwise exist. In Advisory Opinion 2019-13, the Commission determined that

² 52 U.S.C. §30114(a)(6).

³ 52 U.S.C. §30114(b).

⁴ 52 U.S.C. §30114(b)(2).

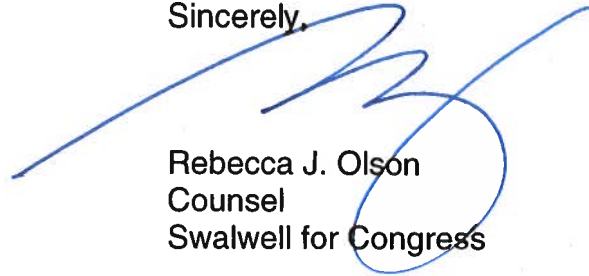
childcare expenses that were a direct result of campaign activity would not exist irrespective of the campaign, so they could be paid for with campaign funds.

In addition, the Commission has also held that campaign funds could be used for campaign travel expenses for minor children of an officeholder even if the children may not participate in campaign activities.⁵ If travel for minor children has been permitted in the past, then childcare for those children who do not travel must also be permissible.

Because the travel and necessary childcare would not be required if Congressman Swalwell was not a member of Congress, a member of Democratic party leadership and a prolific political fundraiser, these expenses are not for personal use. These invitations would not occur if not for his status as an officeholder and Democratic party leader. Therefore, the Commission must conclude that campaign funds can be used for childcare, including overnight childcare, while the Congressman travels in response to the requests detailed above.

We appreciate the Commission's consideration of our request. If you need additional information, please do not hesitate to contact me.

Sincerely,



Rebecca J. Olson
Counsel
Swalwell for Congress

⁵ Advisory Opinion 2005-09.