STATE ETHICS ADVISORY COMMISSION

ADVISORY OPINION 1984-23

> Re: If a person left office before September 1, 1983, but still maintains a political funds account, is the account now subject to the six-year provision in H.B. 2154? Is interest accrued on such an account subject to the personal use restriction?

This opinion responds to a request (AOR 1984-25) from the Public Servant Standards of Conduct Advisory Committee for a State Ethics Advisory Commission opinion. The request was received by the Commission at its meeting on January 13, 1984, and relates to the following issue:

> If a person left office before September 1, 1983, but still maintains a political funds account, is the account now subject to the six-year provision in H.B. 2154? Is interest accrued on such an account subject to the personal use restrictions?

For the purposes of this opinion, we assume that the former office-holder will not again become a candidate any office during the six year period after leaving office and will not accept any contributions subsequent to August 31, 1983.

Chapter 14, as recently amended, moves beyond the requirements of record keeping and reporting of contributions and expenditures into the area of explicit regulation of the use and maximum retention of political funds. H.B. 2154, Acts of the 68th Legislature, Regular Session, 1983, provides that candidates and office-holders may not convert political funds accepted on or after September 1, 1983, to personal use and may retain political funds for no more than six years after leaving candidate or office-holder status. See Tex. Elec. Code Ann. arts. 14.03d, 14.07a(d) (Vernon Supp. 1984).

Section 16 of H.B. 2154 specifically limits the applicability of the personal use prohibition to contributions accepted on or after September 1, 1983. An issue which must be addressed herein is the determination of which political funds are subject to the six-year retention restriction. We note that the effective date of H.B. 2154 was September 1, 1983. There is nothing in art. 14.07a(d) or in the section of the bill declaring the effective date of the act to indicate that the legislature intended this mandatory disposition provision to apply retroactively to contributions accepted before the effective date of the act.

The Secretary of State's 1983 "Political Funds Reporting and Disclosure Directive" interprets the new requirement to apply only to funds accepted on or after September 1, 1983. In § 3.03(c)(5) that directive states:

> NOTE: The requirement to dispose of unexpended contributions does not apply to contributions accepted before September 1, 1983, provided that such contributions are not commingled with contributions accepted on or after September 1, 1983.

That interpretation, which gives the law a prospective effect, is consistent with article I, § 16 of the Texas Constitution, which states that:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

The Secretary of State's directive is also consistent with the adherence by the Texas courts to the constitutional mandate, as indicated by a recent supreme court opinion:

> It is well settled in this state that laws may not operate retroactively to deprive or impair vested substantive rights acquired under existing laws, or create new obligations, impose new duties, or

adopt new disabilities in respect to transactions or considerations past. Ex. Parte Abell, 613 S.W. 2d 255, 260 (Tex. 1981).

The retroactive application of this new disposition requirement to contributions made and accepted before the effective date of the act would "impose new duties, or adopt new disabilities in respect to transactions or considerations past" in violation of art. I, § 16. Therefore, based on this constitutional provision, the face of the legislative act, and the interpretation applied by the Secretary of State, we conclude that campaign contributions that were accepted prior to September 1, 1983, are not subject to the six-year disposition requirement prescribed in art. 14.07a(d).

As noted earlier, H.B. 2154 does not subject pre-September 1, 1983 contributions to the personal use prohibition in art. 14.03d. To answer the second question presented in this opinion request, we must determine whether interest derived on or after that date from the investment of those political funds is subject to the personal use restriction of Chapter 14. Article 14.03d is silent on that question.

In this regard, the Secretary of State has recently clarified the relationship between invested contributions and the earnings derived therefrom under Chapter 14 in Tex. S.O.S. Elec. Law Op. No. JWF-34 (1984). That opinion looked to the common law and to a ruling of a sister state pertinent to the issue of statutory personal use restrictions on political funds.

The Secretary of State noted in his opinion that in 1982, the attorney general of California responded to an opinion request that was very similar to the one under his consideration. It involved the question of the applicability of the personal use restrictions of § 12401 of the California Elections Code to interest earned on invested political funds. Since the question of interest was not addressed by statute, the California attorney general relied on the common law principle that:

> . . . the proceeds of an investment are an accretion or increment to the principal earning it, and unless lawfully separated therefrom become a part thereof. (Pomona City School Dist. v. Payne (1953) 9 Cal. App. 2d 510, 516.) Since proceeds, including interest and dividends, become part of the principal, they are subject to the same restrictions.
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> Further, by mere reasoned analysis, the investment of funds for personal benefit constitutes the use thereof for personal use. Hence, the diversion of proceeds, including interest and dividends, to personal use would be inherently inconsistent with the restrictions upon the use of the principal. Op. Cal. Att'y Gen. 82-902.

Like the California statute, the Texas statute is silent on this issue. Therefore, the Secretary of State relied on the common law as stated by the Austin Court of Civil Appeals:

> Interest, according to all the authorities, is an accretion to the principal fund earning it, and, unless lawfully separated therefrom, becomes a part thereof. We think it is clear that the interest earned by deposit of special funds is an increment that accrues to such special fund . . . . Lawson v. Baker, 220 S.W. 260, 272 (Tex. Civ. App. - Austin 1920, writ ref'd).

That decision was cited favorably by the Texas Supreme Court in Sellers v. Harris Co., 483 S.W. 2d 242 (Tex. 1972) when it relied on that point to find a Texas statute unconstitutional. The Sellers decision was cited favorably by the United States Supreme Court in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S. Ct. 466, 450 1980).

The Secretary of State concluded in JWF-34 that:

> It is evident that the common law treats accessions to principal as part of the principal and subjects them to the same restrictions. Construing article 14.03d to be evidence of legislative intent to explicitly regulate only the use of contributions without similarly regulating the use of the interest or other earnings derived from the investment of the contributions is inherently

inconsistent with the common law rule. Therefore, it is my opinion that any increments, accretions or accessions derived from or attributed to the investment of contributions accepted by a candidate or office-holder on or after September 1, 1983, are subject to the personal use prohibition of article 14.03d.

This Commission adopts the reasoning of the Secretary of State in Tex. S.O.S. Elec. Law. Op. No. JWF-34 (1984) in regard to the applicability of art. 14.03d to earnings derived from invested contributions which were accepted on or after the effective date of the restricting statute. However, that opinion did not address the question of applying the personal use prohibition to the interest accrued on campaign funds accepted before the provision became effective. Applying the logic of JWF-34 to the question before the Commission, we conclude that when political funds themselves are not subject to the personal use prohibition statute, it must follow that accessions to them are also not subject to the prohibition.

In light of the Texas common law maxim and the parallel law and interpretation in California, and lacking any indication of legislative intent to the contrary, we find that interest derived from contributions accepted prior to September 1, 1983, is not subject to the personal use prohibition. It is also the position of the Commission that a contrary conclusion would violate Tex. Const. art. I, § 16.

SUMMARY

Political contributions accepted by a candidate or office-holder before September 1, 1983, are not subject to the six-year disposition requirement of art. 14.07a(d) of the Election Code. Interest derived from the investment of these political funds is not subject to art. 14.03d even if earned on or after September 1, 1983.

W. Page Keeton, Chairman
State Ethics Advisory Commission
Adopted this 14th day of September, 1984.