



STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

April 15, 2021

Hon. Kevin Hertel
PO Box 30014
Lansing, MI 48909

Dear Representative Hertel:

The Michigan Department of State (Department) acknowledges receipt of your letter dated January 25, 2021, which requests the issuance of a declaratory ruling or interpretative statement regarding the Department's interpretation of the Michigan Campaign Finance Act, MCL 169.201, *et seq.* The same day, the Department published a copy of your request on its website and invited public comments regarding your request, but none were received.

The MCFA and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq.*, require the Department to issue a declaratory ruling if an interested person submits a written request that presents a question of law and a reasonably complete statement of facts. MCL 24.263, 169.215(2). If the Department declines to issue a declaratory ruling, it must instead offer an interpretive statement "providing an informational response to the question presented[.]" MCL 169.215(2). In compliance with the MCFA and the APA's publication and public comment period requirements, the Department posted to its website and informed e-mail subscribers of its preliminary response and the deadline to file public comments. *Id.* The preliminary response to your request was posted on March 30, 2021, and to date, no public comments have been received.

Because your statement of facts is not sufficient, the Department declines to issue a declaratory ruling and issues this interpretive statement in response to your request.

Your request states that you are a State Representative elected to your third term in November 2020, and you maintain your candidate committee, the Committee to Elect Kevin Hertel. You state that as a State Representative, your job duties include, in part, attending legislative sessions, committee meetings, and votes and you are obligated to attend such sessions under the House rules. As a result of the House rules, you contend that you are obligated to attend such session in person.

You argue that attending in person has presented a risk as a result of the COVID-19 global pandemic since it exposes you and your colleagues to potential exposure to COVID-19. In an effort to limit any exposure, the House of Representatives' COVID-19 Preparedness and Response Plan strongly encourages representatives (and mandates employees) to wear a mask while in public areas of the Capitol and House Office buildings.

You further state that you encounter threats of violence daily during the course of conducting your duties as State Representative. Specifically, you cite “heavily armed ‘protestors’” in the State Capitol on April 30, 2020 who attempted to gain access to the floor of the House of Representatives. You also cite instances in which you and your family have received threats of violence or death.

Given all of this, you ask questions which the Department restates as follows:

- (1) Whether the purchase of personal protective equipment (PPE) in response to the COVID-19 public health epidemic constitutes a personal expense;
- (2) Whether the purchase of a ballistics vest or home security system in response to threats of violence constitutes a personal expense.

At the heart of these questions is whether the requested items above are considered personal expenses or incidental office expenses. In creating and defining expenditures under section 6, the Legislature has provided a guiding framework for limiting how and to whom committees may disburse their money. Registered committees are subject to a number of limitations when making expenditures. “Expenditures by a candidate committee must be made for the purpose of influencing an election, not for the personal benefit of an individual.” *Interpretive Statement to Christopher Rose*, Issued November 2, 1978. Candidate committees are allowed disbursements only if they qualify as expenditures¹, which in turn are subject to limitations.

However, the Legislature has also allowed incumbent officeholders to use candidate committee funds to pay for ordinary and necessary expenses created for the purpose of carrying out the business of an elective office – called incidental office expenses. While still an expenditure, an incidental office expense is “an expenditure that is an ordinary and necessary expense, paid or incurred in carrying out the business of an elective office.” MCL 169.209(1). The MCFA does not allow a candidate committee to make disbursements for incidental office expenses unless the candidate actually holds elective office. MCL 169.221a(1). All incidental office expenses are expenditures, but not all expenditures are incidental office expenses. To qualify as an incidental office expense, the disbursement must qualify under one of the subsections outlined under the Act. MCL 169.209(1).

The purchase of tangible assets, such as PPE and a home security system, must be evaluated as to the question of whether they constitute personal expenses. To determine whether a disbursement is a personal expense, the Department applies a “but-for” test in order to determine whether the expenditure may be personal in nature: If the disbursement would have occurred irrespective of the individual’s status as a candidate or an office holder, the expenditure is a prohibited personal expense.

Ultimately, to answer your questions, the Department must determine the threshold question of whether the items sought would have been purchased regardless of your status as an office holder – in other words, whether they constitute personal expense.

¹ “Expenditure” is defined in relevant part as a payment of anything of ascertainable monetary value in assistance of or opposition to the nomination or election of a candidate. MCL 169.206(1).

I. Whether the purchase of PPE in response to the COVID-19 public health epidemic constitutes a personal expense.

As of the date of the issuance of this preliminary response, the COVID-19 pandemic is proving to be the greatest health crisis the State of Michigan has faced in nearly a century. Thus far, the State of Michigan has seen nearly 765,000 confirmed cases and over 16,600 deaths as a result of COVID-19.² The State's health experts have confirmed the health risks associated with exposure to COVID-19, including the potential death of Michigan's citizens.

In order to combat the spread of COVID-19, the State and many localities have responded with various public health orders designed to slow the spread of COVID-19 in the general public. Many of these public health orders have been guided by the Centers for Disease Control and Prevention's (CDC) recommendations on how to best slow the spread. One such order issued by the Director of the Michigan Department of Health and Human Services (MDHHS) generally requires facemasks be worn "where two or more persons from more than one household are present in a shared space."³ The CDC guidance also recommends businesses and employers implement routine cleaning and disinfection protocols for surfaces and employees wear PPE such as masks.⁴ Additionally, private businesses have placed similar requirements on their consumers by requiring facemasks and sequestering the public to six-foot increments as suggested by the CDC. Ultimately, PPE and other cleaning supplies such as hand sanitizer and disinfectants have become ordinary – if not mandatory – in the workplace.

In response, you ask whether your committee may purchase (for you and your staff) PPE as an incidental office expense. What is not immediately clear from your request is whether the PPE purchase is based entirely upon the requirements placed upon you or your staff in the capacity of a State Representative or in the more general capacity. Therefore, the Department concludes that a committee may purchase PPE as an incidental office expense using committee funds so long as the committee demonstrates the purchase is not a personal expense.

As previously indicated, in determining whether an expenditure is personal in nature, the Department applies the "but-for" test: if the disbursement would not otherwise have occurred but for the status as an officeholder, committee funds may be used. As applied here, a committee may not use committee funds to purchase PPE as an incidental office expense where the committee would have purchased PPE regardless of the status as an office holder. But where the PPE must be purchased in order to carry out the duties of elected office, committee funds may be utilized. For example, if a committee purchases a facemask for the candidate using committee funds because a store requires a facemask to enter, such a disbursement would constitute an improper personal expense. Conversely, if a committee purchases a facemask in order for the

² Available at <https://www.michigan.gov/coronavirus/>, last accessed April 14, 2021.

³ DHHS Gatherings and Facemask Epidemic Order, available at: https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98455-554922--,00.html, last accessed April 14, 2021.

⁴ https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Forganizations%2Fcleaning-disinfection.html.

office holder to attend constituent meetings at a public facility mandating facemasks for entry, such disbursement would qualify as an incidental office expense.

Ultimately, a committee may not use committee funds to purchase PPE as an incidental office expense where it would have been purchased regardless of the status as an office holder, but where the PPE must be purchased in order to carry out the duties of elected office, committee funds may be utilized. The burden is on the committee at the time of filing a campaign statement to demonstrate that the disbursement would not have been made but for the candidate's status as an officeholder. This can be accomplished by entering a specific purpose into the description field (e.g. "Facemask for Constituent Meetings").

II. Whether the purchase of a ballistics vest or home security system in response to threats of violence constitutes a personal expense.

Your next question presented asks whether a State Representative may make a disbursement as an incidental office expense for certain security equipment such as a home security system and/or ballistics vest in response to threats received and the general increase of violence. In 2020, elected and appointed officials in the State of Michigan⁵ have seen an unprecedented number of threats of physical harm against them and their families. Most notably, the Michigan Attorney General and the United States Attorney have brought charges against individuals making death threats against a member of the Wayne County Board of Canvassers,⁶ against militia members plotting to storm Michigan's Capitol, take hostages, publicly execute legislators, and set the building on fire,⁷ and against militia members plotting to kidnap and physically harm the Governor.⁸ Outside of charges, multiple members of the Michigan Board of State Canvassers reported receiving threats in advance of their November 23, 2020 board meeting, and as you reported, several members of the State Legislature have indicated they have received threats regularly.

Most recently, on January 6, 2021, the day Congress convened to count the electoral votes, armed insurrectionists stormed the U.S. Capitol forcing the evacuation of the Vice President,

⁵ Unfortunately, this increased threat of violence is not unique to Michigan. In the wake of the riot at the United States Capitol on January 6, 2021, the Massachusetts Office of Campaign and Political Finance issued an advisory opinion on March 1, 2021 concluding that committee funds may be used to purchase bullet-proof vests/body armor, pepper spray, gas masks, or other similar personal protective equipment so long as such equipment is not purchased for personal use. Massachusetts Advisory Opinion 21-02, available at <http://files.ocpf.us/pdf/legaldocs/AO-21-02.pdf>. The State of Massachusetts also previously authorized committee funds to pay for security detail and purchase a home security system. *See id*, citing 970 CMR 2.06(3)(1); Massachusetts Advisory Opinion 11-04, available at <http://files.ocpf.us/pdf/legaldocs/AO-11-04.pdf>.

⁶ <https://www.freep.com/story/news/local/michigan/wayne/2020/12/23/monica-palmer-threats-wayne-county-election-katelyn-jones/4026231001/>

⁷ <https://www.usatoday.com/story/news/nation/2020/11/13/michigan-attorney-general-office-gretchen-whitmer-plot-details/6269455002/>

⁸ <https://www.detroitnews.com/story/news/local/michigan/2020/10/08/feds-thwart-militia-plot-kidnap-michigan-gov-gretchen-whitmer/5922301002/>

Senators and Representatives. More than 140 people were injured, and five were killed.⁹ The FBI has charged more than 300 individuals with federal crimes.

Through several advisory opinions interpreting the Federal Election Campaign Act of 1971 (FECA) and its regulations, the FEC has been asked similar questions. Under FECA, federal committees may use campaign funds for “ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.” 52 U.S.C. § 30114(a). A contribution or donation may not be converted for personal use. 52 U.S.C. § 30114(b)(1). The FEC’s regulations define personal use as the “use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 CFR § 113.1.

In analyzing these provisions in response to a request by the National Republican Senatorial Committee and the National Republican Congressional Committee, the FEC was asked whether committee funds may be used to pay for personal security personnel of members of Congress and their families. FEC Advisory Opinion 2021-03. In analyzing whether this type of disbursement constitutes an “ordinary and necessary expense incurred in connection with the duties of the individual as a holder of Federal office,” the FEC concluded that committee funds could be used for security personnel due to threats arising from their status as officeholders. *Id.*

This was not the first advisory opinion the FEC has authorized the use of campaign funds to protect against threats to officeholders’ physical safety on the grounds that the need for such security expenses would not have been incurred but for the officeholders’ activities or duties. For example, after shootings targeting U.S. Representatives Gabby Giffords and Steve Scalise, the Commission authorized candidate committee funds to be used to purchase home security system installation and upgrades due to the “current heightened threat environment” and anonymous nature of many of the threats. FEC Advisory Opinion 2011-17¹⁰; 2017-07.¹¹ In 2020, the Commission expanded its guidance to include upgrades to wiring and lighting so long as it did not constitute a structural improvement. FEC Advisory Opinion 2020-06.¹²

The MCFA’s provisions echo its FECA counterparts. Michigan allows incumbent officeholders the ability to make incidental office expenses defined as “an expenditure that is an ordinary and necessary expense, paid or incurred in carrying out the business of an elective office.” MCL 169.209(1). Expenditures are defined as any of ascertainable monetary value made in assistance of or opposition to the election of a candidate. MCL 169.206(1). The Department has previously concluded that expenditures may only be made for election-related purposes and may not be converted for personal use. *Interpretive Statement to Christopher Rose*, Issued November 2, 1978.

⁹ <https://www.cbsnews.com/news/capitol-riot-arrests-2021-03-25/>

¹⁰ Available at <https://www.fec.gov/files/legal/aos/2011-17/AO-2011-17.pdf>.

¹¹ Available at <https://www.fec.gov/files/legal/aos/2017-07/2017-07.pdf>.

¹² Available at <https://www.fec.gov/files/legal/aos/2020-06/2020-06.pdf>.

While not binding, the Department may rely upon administrative opinions of the Federal Election Commission, and other states, as persuasive in its interpretation of similar provisions of the MCFA. See *Interpretive Statement to David Lambert*, issued October 31, 1984¹³; *Chiles v. Machine Shop, Inc.*, 238 Mich App 462, 472 (1999) (stating that analogous federal precedents of similar legal provisions are persuasive so long as they do not conflict with Michigan law). Through its advisory opinions, the FEC has ultimately concluded that committee funds may be used for a security system so long as the security system does not constitute a personal expense or a structural improvement to real property.

The Department agrees with these conclusions and determines that a committee may purchase home security system as an incidental office expense so long as the expenditure is not being made for personal use. If an office holder determines it necessary to purchase a home security system due to increased threats incurred as a result of their elected office, such purchase may be done using committee funds. For example, if the committee elects to purchase a home security system as a direct result of threats motivated by the office holder's status, such as supporting/opposing legislation, such a disbursement may be a lawful incidental office expense.

However, the disbursement must be done as a result of their status as an office holder, otherwise it will constitute a personal expense. For example, a disbursement for home security system may not increase the value of the residence or constitute a structural improvement (e.g. installation of bullet proof glass or privacy fence), and must be motivated by the office holder's status as an office holder.

The burden is on the committee at the time of filing a campaign statement to demonstrate that the disbursement would not have been made but for their status as an officeholder. This can be accomplished by entering a specific purpose into the description field.

III. Asset disposition upon committee's dissolution

Any purchase of consumable supplies or permanent assets by the committee remains subject to the Department's rules on asset disposition upon the committee's dissolution. See *Interpretive Statement issued to Christopher L. Rose*, Issued November 2, 1978 ("The Act does not expressly permit usage or retention of these assets and moneys by the candidate for his personal benefit.") Consumable supplies are assets or goods that are intended to be "used up" or discarded. See *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/consumed>; *FTC v. Staples*, 970 F. Supp. 1066, 1073 (D.D.C. 1997). Comparatively, permanent assets are those that are not intended to be discarded. *Id.*

Assets purchased which are no longer being used as incidental office expenses must be disposed of properly upon dissolution, and committees maintaining assets remain ineligible to dissolve. R. 169.28. The Department considers a home security system and ballistics vest a permanent asset, while PPE is considered a consumable.

For the purchase of permanent assets, such as the ballistics vest or home security system, the committee must maintain records of the purchase. Upon dissolution, the items may be sold at

¹³ Available at https://www.michigan.gov/documents/sos/Lambert_1984_429284_7.pdf.

fair market value and the funds deposited into the committee's account or donated to a qualifying charity. R. 169.65¹⁴ Items may also be transferred from a dissolving committee to an eligible committee under § 45 of the Act.

Consumable supplies do not need to be recorded in this manner. The committee purchasing must only report the expense as an incidental office expense under the appropriate report.

IV. Conclusion

An office holder may purchase PPE (for themselves and staff), a ballistics vest, or a home security system (for themselves) as an incidental office expense so long as the disbursement would not have been made but for their status as an office holder. Stated differently, if the office holder would have purchased PPE, a ballistics vest, or a home security system if they were not an office holder, then such a disbursement would be a barred personal expenditure. But where the disbursement is being made only as a result of their status as an office holder, such a disbursement may be a proper incidental office expense during their tenure as an office holder.

The foregoing represents an interpretive statement concerning the applicability of the Campaign Finance Act.

Sincerely,

Melissa J. Smiley, Ph.D.
Chief of Staff

¹⁴ Rule 65 specifically governs the dissolution of assets purchased using Officeholder Expense Funds (OEF). In 1994, the MCFA was amended to eliminate OEFs and replace them with incidental office expenses under one candidate committee. 1994 PA 411.