

State of Wisconsin \ Government Accountability Board

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the Meeting of July 21-22, 2010

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel

Prepared and Presented by:
Michael Haas, Staff Counsel

SUBJECT: Implementation of Impartial Justice Act

Introduction: Board staff has continued to address issues related to the initial implementation of the Impartial Justice Act (the Act) in light of the election for Supreme Court Justice in the 2011 Spring Election. Several provisions of the legislation require administrative interpretation and policy decisions to provide consistent guidance to candidates and committees as well as consistent enforcement of the campaign finance laws. This memorandum summarizes Board staff's interpretation regarding questions and issues which have arisen.

Summary of Recommended Motion: Adopt staff recommendations for implementation of the Impartial Justice Act and administration of the Democracy Trust Fund as outlined in this memorandum.

Background:

As a brief refresher of some key terms and provisions, the Act created the Democracy Trust Fund (DCF), from which public financing grants may be issued to candidates for Supreme Court Justice, in the form of a line of credit established by the State Treasurer, upon certification of the candidate's eligibility by the Board. For the 2011 Spring Election, the exploratory period began on May 1, 2010 and ended on July 1, 2010. The qualifying period began on July 1, 2010 and ends on the first Tuesday in January, 2011, which is the filing deadline for nomination papers and a key date for administration of the Act. The primary election period begins the day after the filing deadline and ends on the day of the Spring Primary. The election campaign period begins the day after the Spring Primary and ends on the day of the Spring Election.

During the exploratory and qualifying periods, a participating candidate may raise up to \$5,000 in private seed money contributions, which are contributions not exceeding \$100 and up to \$5,000 in the candidate's personal funds. To become eligible for the public financing benefit,

a candidate must receive qualifying contributions, ranging from \$5 to \$100, from at least 1,000 separate contributors, for a total of at least \$5,000 and no more than \$15,000, during the qualifying period. Therefore, the maximum amount of private funds that may be legally raised by a participating candidate is \$20,000 (up to \$5,000 in seed money and up to \$15,000 in qualifying contributions). Any private funds exceeding that aggregate total must be transferred to the Board and deposited into the DCF.

A participating candidate may not make or authorize total disbursements, from July 1, 2010 to the 2011 Spring Election, which exceed the maximum seed money and qualifying contributions raised, plus any applicable public financing benefit and matching funds. Seed money contributions and contributions from a participating candidate's personal funds may not be spent after the filing deadline in January.

The Impartial Justice Act reduced the limit for individual contributions to nonparticipating supreme court candidates from \$10,000 to \$1,000. Nonparticipating candidates are not limited in the total amount of contributions or expenditures that may be accepted or made, although they are limited in the amount of contributions that may be accepted from political committees, including party and legislative campaign committees. Except for personal funds, a participating candidate cannot accept contributions exceeding \$100, and may not accept PAC funds. In addition, seed money and qualifying contributions raised by a participating candidate must be made by Wisconsin electors.

A participating candidate must file an application for the primary election public grant (\$100,000) with the Board no later than the day after the deadline for nomination papers in January. The Board must verify that the candidate has raised sufficient qualifying contributions from at least 1,000 separate Wisconsin contributors and complied with other provisions, and may use verification and sampling techniques which the Board considers appropriate. The Board must certify candidates to the State Treasurer "promptly" after the candidate demonstrates eligibility, and no later than 5 days after the filing deadline. Regardless of how early a candidate applies and is certified, the candidate may not use the line of credit until the beginning of the primary election campaign period (the day after the filing deadline). If there is no primary opponent, a participating candidate does not receive the \$100,000 public grant for the primary.

A participating candidate must file a second application for the spring election public grant (\$300,000). The Act requires the second application to be filed no later than 7 days after the Spring Primary (§11.503(1), Stats.), but states that the Board must certify candidates no later than 48 hours after the Spring Primary (§11.51(3), Stats.). However, the State Treasurer is not to establish a line of credit for any candidate until all candidates who apply and qualify have been certified as eligible.

Two types of matching funds, which the Act describes as supplemental grants, are available for participating candidates. A supplemental grant is provided when a non-participating candidate's expenditures exceed \$105,000 during the primary election campaign period, or \$315,000 during the election campaign period. When a nonparticipating candidate reaches those thresholds, the participating candidate receives a supplemental grant equal to the excess disbursements made by the nonparticipating candidate over the applicable grant amounts, up to three times the amount of the base grant. Under §11.512, Stats., disbursements of a

nonparticipating candidate made or obligated prior to the filing deadline count towards the calculation of matching funds.

A separate supplemental grant is also available if aggregate independent expenditures against the participating candidate or in support of an opposing candidate exceed \$120,000 prior to the Spring Election, or \$360,000 in the election campaign period. Once either threshold is met, the amount of the matching funds granted to a participating candidate based on aggregate independent expenditures is equal to the total disbursements made or obligated to be made by independent disbursements, up to three times the amount of the respective base grant.

Implementation Decisions:

Board staff recommends that the Board adopt the following interpretations of provisions of the Impartial Justice Act to guide its administration and enforcement.

1. Availability and timing of public financing benefits.

While the Act establishes deadlines for the Board to certify the eligibility of participating candidates, it is necessary to clarify how early in the process the Board may certify that a candidate is eligible for either the base public grants or the matching funds, and how soon a candidate may receive a line of credit from the State Treasurer in specific circumstances.

A. Primary campaign base grant: Pursuant to §11.51(2), Stats., the Board shall certify the name of each eligible candidate to receive the primary election base grant (\$100,000), no later than 5 days after the filing deadline, and the Treasurer shall immediately credit the candidate's account with a line of credit. "Eligible candidate" is defined as a candidate who has an opponent who has qualified to have his or her name certified for placement on the ballot at the spring primary or election, and who has qualified for the public financing benefit by collecting the required qualifying contributions and making all required reports and disclosures (§11.501, Stats.).

Based upon these provisions, Board staff understands the legislation to allow certification of candidates to receive the primary base grant only after three candidates (or more) have filed sufficient nomination petitions and other documents to qualify for ballot access, resulting in a Spring Primary. Until that time, a candidate who applies for public financing cannot be an "eligible candidate", for purposes of the primary election grant. Sections 11.51(2) and 11.511(1), Stats., also provide that the base grants for the Spring Primary and Spring Election may not be utilized by a candidate until the beginning of the primary election campaign period (the day after the filing deadline).

B. Primary campaign matching funds: In addition, Board staff has concluded that supplemental grants based upon the disbursements of a nonparticipating candidate or upon independent disbursements may not be released to a candidate prior to the start of the primary election campaign period. Both types of matching funds are incorporated into the definition of the "public financing benefit" which may be used to finance lawful disbursements only during the primary and election campaign periods, pursuant to §§11.501(14) and 11.511(1), Stats.

The practical effect of the law, therefore, is that a participating candidate is limited to spending a maximum of \$20,000 in campaign funds from May 1, 2010 until the start of the primary campaign period, regardless of the amount of expenditures made by nonparticipating candidates or independent groups prior to the filing deadline.

Participating candidates are also prohibited from spending seed money contributions or qualifying contributions after the filing deadline (§11.508, Stats.) However, for purposes of calculating the amount of matching funds available to a participating candidate after the filing deadline, disbursements made by nonparticipating candidates and by independent groups at any time after May 1, 2010 are included. The descriptions of those matching funds in Sections 11.512 and 11.513, Stats., are not limited to a calculation of opposing expenditures made after the filing deadline.

C. Public financing grants in the absence of an opponent or a Primary Election: In the event that a candidate has no opposition at all, the definition of “eligible candidate” precludes the certification of that candidate for public financing and issuance of either the base grants or matching funds. If there are only two candidates that qualify for ballot access, Section 11.511(4), Stats., provides that no candidate may receive a public financing grant for the primary election campaign period.

However, the consensus of Board staff is that the Impartial Justice Act permits an eligible candidate with only one opponent to receive the base grant for the Spring Election as well as any applicable matching funds prior to the Spring Primary. Section 11.511(1), Stats., requires the State Treasurer to provide each eligible candidate separate lines of credit to be used for lawful disbursements during the primary and election campaign periods “to further the election of the candidate in that primary or election” (emphasis added). Although the public funds may not be used for a primary, if there is no primary opponent, there appears to be no prohibition on using those funds in the primary election period if they are used for the Spring Election. In the absence of a primary, therefore, the legislation does not appear to require delaying issuance of the \$300,000 Spring Election grant until after the date of the Spring Primary.

In essence, the primary election period is eliminated and the issuance of grants for the Spring Election is accelerated when only two candidates are certified for ballot access. Consistent with this interpretation, matching funds for the Spring Primary would be eliminated and would be calculated based only on the formulas for the Spring Election. Expenditures of nonparticipating candidates and other individuals, committees, and organizations would be measured against the \$300,000 threshold for the base grant.

A contrary interpretation would leave a participating candidate with minimal available funds during the period from the date of the filing deadline through the Spring Primary, as seed money contributions and personal funds of the candidate may not be spent during this period, pursuant to §§11.507(2) and 11.508(2), Stats. Such an interpretation would also discourage the Act’s goal of encouraging participation in the public financing system by eliminating the ability of a participating candidate to respond to disbursements of an opponent or independent committees until six weeks before the Spring Election.

2. Independent expenditures and interplay with GAB §1.28, Wis. Adm. Code.

One of the two possible supplemental grants available to a participating candidate is based upon aggregate independent disbursements made or obligated to be made by a person against an eligible candidate, or for the opponents of an eligible candidate, which exceed 120 percent of the base grant for the Spring Primary or for the Spring Election (§11.513(2), Stats.).

“Independent disbursement” is defined as a disbursement by a person “expressly advocating the election or defeat” of a clearly identified candidate which is made without the cooperation, consultation, request, or suggestion of a candidate (§11.501(10), Stats.). That definition incorporates the definition of a “disbursement” in 11.01(7)(a), Stats., specifically the requirement that the expenditure be made for a “political purpose,” as described in §11.01(16), Stats. GAB §1.28 further defines statements of political purpose to include those using words such as “vote for” or “vote against”, as well as those meeting the functional equivalent test for communications within 30 days of the Spring Primary or 60 days of the Spring Election. The question is whether the definition of disbursements triggering matching funds is intended to be more restrictive in the Impartial Justice Act than in the campaign finance law generally.

Board staff recommends that, in administering the Impartial Justice Act, the Board interpret the term “independent disbursement” broadly to be consistent with §11.01(7)(a) and GAB §1.28. The words “expressly advocating” are nowhere defined by statute, the Legislature was presumably aware of the proposed administrative rule when it enacted the Impartial Justice Act, and the communications covered by the new rule are those that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Such an interpretation would not only serve the principle of encouraging participation by allowing candidates to answer the full range of independent disbursements that criticize a participating candidate or support a privately-financed opponent, it would also reduce confusion by applying a consistent application of terms such as “political purpose” and “independent disbursement” in the Board’s administration and enforcement of Chapter 11.

3. Use of existing funds

The Impartial Justice Act trailer bill (2009 Act 216), clarified that the exploratory period for each election begins in the preceding year, rather than during any prior year of an incumbent’s term (§11.501(7), Stats). The question arises as to the treatment of campaign contributions and expenditures made prior to the beginning of the exploratory period for the 2011 Spring Election, which was May 1, 2010. Several current Supreme Court Justices, including Justice David Prosser, had existing campaign funds at the time the Impartial Justice Act became effective, and future candidates may seek to raise and spend funds prior to the exploratory period for each respective election.

Pursuant to §11.511(7)(a), no participating candidate may make total disbursement exceeding the maximum amounts of allowable seed money contributions and qualifying contributions and public financing grants, including matching funds, beginning with the first day of the exploratory period and ending on the date of the Spring Election. The Act establishes civil and criminal penalties for participating candidates who exceed the contribution limits or the expenditure limits (§§11.517 and 11.518, Stats.).

Based upon these provisions, Board staff believes that the legislation contemplated the start of a campaign, for the purpose of a participating candidate's eligibility, to be the beginning date of the exploratory period. In other words, contributions received by a candidate prior to the exploratory period do not count towards the limits for seed money or qualifying contributions, and may be used for political expenditures made prior to the start of the exploratory period (the day after the Spring Primary of the year preceding the election, except in relation to the 2011 election, for which the exploratory period began May 1, 2010). Permitting the use of such funds after the exploratory period begins would conflict with the Act's goal of promoting publicly-financed Supreme Court campaigns except where private funds are specifically allowed.

Board staff recognizes that current candidates have not yet received definitive guidance regarding the use of campaign funds that existed prior to the Act's effective date. Therefore, given the equitable considerations, the staff recommends that the Board not disqualify from public financing a candidate who has used funds raised prior to the exploratory period for expenditures made or obligated between May 1, 2010 and July 21, 2010. However, Board staff believes the Board should also deduct the total amount of any such expenditures from the base grants to be issued to a participating candidate. In that way a participating candidate utilizing existing funds after the exploratory period begins will not have an advantage in the amount of total private funds that can be spent, but will have fair notice of the deadline established by the Board for terminating use of previously-existing funds.

4. Reporting requirements.

The Act establishes reporting requirements for both participating and non-participating candidates in addition to the regular reporting requirements in Chapter 11, and requires prompt analysis by Board staff to determine candidate eligibility for public financing grants and the amount of matching funds. Beginning in September, participating and nonparticipating candidates are required to file reports of fundraising activity on the 15th and last day of each month, and beginning in January, 2011, nonparticipating candidates and independent committees are required to file reports within 24 hours of receiving certain contributions or making or obligating certain disbursements (§§11.506(2), 11.512(1), and 11.513(1), Stats.).

Board staff has initiated changes to the Campaign Finance Information System to accommodate the filing of these interim reports electronically, so that duplicate filing of transactions is minimized. The interim reports will be incorporated into the regular reports on an ongoing basis.

Finally, the Impartial Justice Act does not specifically state that the requirement of 24-hour reports of contributions and expenditures of nonparticipating candidates extends to the period between the Spring Primary and the Spring Election, when the impact of political communications is greatest. However, not enforcing the requirement for 24-hour reporting after the date of the Spring Primary in the same way as prior to that date would lead to an absurd result, as the Board would have no effective tool for monitoring compliance by nonparticipating candidates or for calculating the amount of matching funds to be issued to participating candidates. In addition, the 24-hour reporting requirement for independent disbursements clearly remains in effect during the spring election campaign period pursuant to

§11.513(1), Stats. Therefore, Board staff recommends that the Board adopt a similar and consistent interpretation of the reporting requirement for nonparticipating candidates so that the matching fund provisions may be effectively administered.

In summary, Board staff recommends that the Board ratify the above-described interpretations of provisions of the Impartial Justice Act and direct staff to administer and enforce the Act accordingly.

Recommended Motion

Direct staff to administer provisions of the Impartial Justice Act as follows:

1. The base grants and matching funds to be used by eligible candidates for the Spring Primary shall be issued no earlier than the beginning of the primary election campaign period (the day after the filing deadline), and only when three or more candidates submit necessary documents to qualify for certification of ballot access.
2. For purposes of calculating the amount of matching funds available to a participating candidate after the filing deadline, disbursements made by nonparticipating candidates and by independent individuals, committees and organizations at any time after May 1, 2010 are included.
3. An eligible candidate with only one opponent may receive the \$300,000 base grant for the Spring Election as well as any applicable matching funds prior to the Spring Primary. The matching funds shall be calculated based upon the formulas applicable to the Spring Election when there is no Spring Primary.
4. For the purpose of calculating matching funds based upon aggregate independent disbursements, the term “independent disbursements” shall be interpreted consistently with the term “political purpose” as described in §11.01(16), Stats. and GAB §1.28.
5. Contributions received by a candidate prior to the exploratory period do not count towards the limits for seed money or qualifying contributions, and may be used for political expenditures made prior to the exploratory period (the Spring Primary of the year preceding the election, except in relation to the 2011 election, for which the exploratory period began May 1, 2010). Such expenditures of candidates in the 2011 Spring Election shall be allowed until July 21, 2010, and the total amount of any such expenditures shall be deducted from the base grants to be issued to a participating candidate.
6. The bi-monthly and 24-hour campaign finance reports required by the Impartial Justice Act shall be filed as interim reports to minimize duplicate reporting of transactions, as directed by Board staff.
7. The requirement for nonparticipating candidates and independent committees to file 24-hour reports pursuant to §11.502 and 11.503 shall continue in effect from the date of the Spring Primary to the date of the Spring Election.