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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 2-25-99

February 18, 1999

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Acting Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan Levin
Senior Attorney

SUBJECT: Draft AO 1999-1 - Alternative Drafts

Attached are two proposed drafts of the subject advisory opinion. We request that both drafts be placed on the agenda for February 25, 1999.

These drafts address the question of whether a principal campaign committee may pay a salary to its authorizing candidate pursuant to a formal contract. The "No Draft" answers the question in the negative, and the "Yes Draft" permits the salary arrangement proposed in the request. The Commission and this office have dealt with the salary issue in the past. In its proposed draft of Advisory Opinion 1992-1, the Office of General Counsel recommended approval of committee salary payments to the candidate, and the Commission deadlocked on the issue. In connection with the 1995 regulations on personal use of campaign funds, this office recommended a final regulation that would prohibit salary payments, and the Commission deadlocked on the issue again. In view of the history of this issue, we present drafts containing the appropriate legal analysis for each position.

Attachments

2
3 Mark Greene
4 10149 Stoneleigh Drive
5 Benbrook, Texas 76126-3024
6

DRAFT

7 Dear Mr. Greene:
8

9 This responds to your letter dated December 30, 1998, as supplemented by your
10 letters dated January 12 and January 19, 1999, concerning the application of the Federal
11 Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to
12 your receipt of a salary from your principal campaign committee when you become a
13 Congressional candidate for the 2000 election cycle.

14 *I. Salary Proposal*

15 You are an independent general contractor engaged primarily in remodeling and
16 tenant-finish work. Although your income varies from month to month, your average
17 monthly income is \$5,000 per month with household expenditures of approximately
18 \$4,500 per month. These expenses include mortgage and auto payments; life, health,
19 automobile, homeowners, and professional liability insurance payments; and payments
20 for property taxes, utilities, groceries, debt service, clothing, uninsured medical costs, and
21 other expenses. You state that you are in the initial stages of a campaign in the 2000
22 election for a seat in the U.S. House of Representatives from Texas. You anticipate that
23 your campaign will need to raise more than \$1,000,000, and that you will have to spend a
24 significant amount of time campaigning. Because this time would normally be used to
25 earn an income to support yourself and your family, you intend to enter into a written
26 contract with your campaign committee to receive a salary sufficient to offset the
27 business income loss attributable to the amount of time you spend on campaign activities.

28 Because you perceive the salary as absolutely necessary to the conduct of your
29 campaign, you state that salary payments would not be "excess" funds. You maintain
30 that the receipt of such a salary to offset lost income is "vital to the plausibility of [your]
31 campaign personally, and would be included in both fund-raising strategies and
32 expenditure budgeting projections."

1 You discuss the proposed duration of the contract. You do not expect the
2 coverage period of the contract to begin until the primary election date, which presently is
3 set at March 14, 2000, although you leave open the possibility that the contract will cover
4 a period before the primary date. The expiration date of the contract would occur no later
5 than 90 days beyond the general election. You state that this period should be sufficient
6 to allow you to assist the committee in completing its financial operations and to resume
7 your normal work fully.

8 You propose a salary formula in the contract that would provide that the campaign
9 would pay you the amount of normal wages or salary that you would lose as a result of
10 the time you spent on the campaign. The formula is restated as follows: The amount of
11 lost business income that the campaign will pay to you is the amount of the difference
12 between your average business income and your actual business income for that time
13 period, times the percentage of a full-time work period (based on 40 hours per week) that
14 you worked for the campaign. The salary from the campaign for that period cannot
15 exceed your average business income for a period of the same length. Although your
16 calculations will be based on the concept of a forty-hour work week, the contract will
17 most likely provide for payment on a twice a month basis, and this term will not be
18 modified during the term of the contract.¹

19 An example of how the formula would work is as follows: Your average semi-
20 monthly income in a non-campaign situation is \$2,500. In that period, you work 65 hours
21 on the campaign out of a possible maximum of 87 hours,² i.e., you spent approximately
22 75 per cent of full-time work hours on the campaign. You earn \$900 in business income
23 during this period, i.e., \$1,600 less than you normally earn. The campaign will pay you
24 75 per cent of \$1,600, i.e., the difference between the average business income and the
25 actual business income, or \$1,200.

¹ You provided an algebraic formula based on a pay computation period of a week and the idea that a full-time work period would be 40 hours per week. This formula is as follows: period reimbursement = $r\%$ times $(p - c)$. The "r" figure equals 2.5 times the number of campaign hours worked; hence, the value of "r" would never exceed 100. The "p" figure is the average pre-campaign income for the time period, and the "c" amount is the amount of income earned (business, not campaign) during the campaign period being covered.

² This is the full-time figure for a half-month period provided by you in the discussion of examples in your January 19 supplemental response. It is premised on the 40-hour week.

1 Under your formula, the combined business income and campaign salary for a
2 relevant time period cannot exceed your average income for a non-campaign time period
3 of the same length. If your business income happens to exceed that amount in a time
4 period (e.g., you earn \$3,500 in business income in a half-month), the campaign would
5 not pay you any salary until the candidate's losses, under the formula for the succeeding
6 pay periods, had eliminated this excess. In addition, for you to receive any salary
7 payment from the campaign, you would also need to show an aggregate loss over the past
8 periods covered by the contract.

9 *II. Legal Analysis*

10 The Commission has historically recognized that candidates have wide discretion in
11 making expenditures to influence their election. However, the Act prohibits the
12 conversion of campaign funds to personal use. 2 U.S.C. §439a; 11 CFR 113.2(d); see
13 also Advisory Opinions 1998-1, 1997-27, 1996-40, and 1995-26. Commission
14 regulations at 11 CFR 113.1(g) define personal use for the purposes of this prohibition.
15 Generally, personal use is "any use of funds in a campaign account of a present or former
16 candidate to fulfill a commitment, obligation, or expense of any person that would exist
17 irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR
18 113.1(g). The rules list certain uses of campaign funds that will be considered *per se*
19 personal use. 11 CFR 113.1(g)(1)(i). Under this regulation, personal use includes the use
20 of funds in a campaign account for the following purposes: household food items or
21 supplies; funeral, cremation or burial expenses; clothing; tuition payments not associated
22 with training campaign staff; mortgage, rent or utility payments for the personal residence
23 of a candidate or his family; admission to sporting events, concerts, or other forms of
24 entertainment, unless part of a specific campaign or officeholder activity; dues, fees or
25 gratuities to a country club, recreational facility, or other nonpolitical organization, unless
26 they are part of the costs of a specific fundraising event on the organization's premises;
27 and salary payments to family members, unless they are fair market value payments for
28 *bona fide*, campaign-related services.³ Other uses of campaign funds are to be examined

³ During its consideration of the present regulations on personal use, which became effective in April 1995, the Commission discussed the issue of salary payment by a principal campaign committee to the

1 on a case by case basis using the general definition of personal use. 11 CFR
2 113.1(g)(1)(ii).⁴ These include, but are not limited to, expenses for legal costs, meals,
3 travel, and vehicle costs.

4 You have indicated that the basis for your request is your need for income to pay the
5 expenses that you list above. A number of these expenses, payments for mortgage,
6 utilities, groceries, and clothing, fall within the category of *per se* personal use. The other
7 expenses will exist regardless of whether you become a candidate and are distinguishable
8 from such costs as travel expenses or child care where these costs are incurred in order to
9 enable the candidate and immediate family members to attend campaign-related events.

10 See Advisory Opinions 1996-34, 1995-42, and 1995-20. In effect, you are proposing that
11 your campaign committee do indirectly what it cannot do directly; i.e., pay for expenses
12 that are not related to your campaign.

13 The prevention of the personal use of campaign funds in an indirect manner has been
14 a concern of the Commission as demonstrated in advisory opinions addressing the
15 donation by a principal campaign committee to a charitable, or other non-profit,
16 organization in which the candidate would play a leadership role. In those opinions, the
17 Commission has consistently qualified its allowance with the condition that the candidate
18 or a member of his family does not receive salary or compensation from the recipient
19 organization until the organization has expended, for purposes unrelated to the personal
20 benefit of such persons, the entire amount donated by the campaign committee. Advisory
21 Opinions 1997-1, 1996-40, 1985-30, and 1983-27.

candidate. In the Explanation and Justification to these regulations, the Commission, after discussing public comments both for and against such salaries, noted that it had failed to reach a majority decision on the issue by the required four affirmative votes. Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 *Fed. Reg.* 7862, 7867 (February 9, 1995). In two previous advisory opinions in which it considered the issue of candidate salary and committee payments of monthly living expenses, the Commission noted that it could not reach a decision on those issues. Advisory Opinions 1992-4 and 1992-1.

⁴ In explaining the application of the case-by-case approach, the Commission:
reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.

Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 *Fed. Reg.* 7862, 7867 (February 9, 1995).

1 The Commission notes your argument “that the full-time services of a candidate are
2 an absolute necessity to a campaign,” and that the utilization of campaign funds to offset
3 your lost income is the only way to acquire such services. However, a candidate is
4 traditionally involved in campaign strategy and campaign appearances in support of his or
5 her own campaign, regardless of remuneration. These are not new or additional services
6 which a candidate brings to a campaign, but instead are activities inherent in any
7 candidate’s campaign. Payment of a salary to a candidate would be based on the false
8 premise that the committee is purchasing something that it would not otherwise possess.

9 Finally, since the 1995 issuance of the revised regulations on personal use of
10 campaign funds, the Commission’s advisory opinions have principally addressed
11 expenses other than those listed as *per se* personal use. In Advisory Opinion 1995-26,
12 however, the Commission addressed a request from a Federal officeholder asking
13 whether his campaign committee could pay his athletic club membership dues on the
14 basis that his use of the club facilities had been, and would continue to be, primarily for
15 campaign fundraising. The Commission concluded that, despite this history and stated
16 intent, the payment of club dues is covered by the *per se* rule and would constitute
17 personal use. The Commission distinguished campaign disbursements for costs, separate
18 and distinct from membership dues, that were only for the use of club facilities for
19 specific fundraising or other campaign events, such as meals and lodging incurred by the
20 candidate in order to attend a campaign event. Consistent with this approach to the *per se*
21 rules, as well as the general rule on what constitutes personal use of campaign funds, the
22 Commission emphasizes the differences between the payment of a salary to you and the
23 payment for additional expenses incurred in connection with conducting your campaign,
24 such as travel to campaign events and additional child care related to those events. See,
25 e.g., Advisory Opinion 1995-42.

26 Based on the foregoing, the Commission concludes that you may not receive a salary
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1 Other uses of campaign funds are to be examined on a case by case basis using the
2 general definition of personal use. 11 CFR 113.1(g)(1)(ii). These include, but are not
3 limited to, expenses for legal costs, meals, travel, and vehicle costs. In explaining the
4 application of the case-by-case approach, the Commission stated that “[i]f the candidate
5 can reasonably show that the expenses at issue resulted from campaign or officeholder
6 activities, the Commission will not consider the use to be personal use.” Explanation and
7 Justification, Commission Regulations on Personal Use of Campaign Funds, 60 *Fed. Reg.*
8 7862, 7867 (February 9, 1995).

9 The situation presented entails the payment of a salary by your campaign
10 committee to you in order to enable you to seek Federal office. The Commission
11 acknowledges that the candidate’s salary will ultimately be used for some of the *per se*
12 and other expense categories listed above, but the ultimate use of the salary funds by a
13 recipient is of secondary concern to the nature of the expenditure itself. Since the
14 payment of a candidate salary is not on the *per se* list, it must be analyzed under the
15 general definition at 11 CFR 113.1(g). A salary plan that is specifically tailored to
16 enabling a candidate to take time off from his full-time job so that he can participate fully
17 in his campaign would not be personal use. Your salary proposal permits you to prepare
18 for and attend campaign events, solicit contributions by phone or otherwise, participate in
19 the formulation of campaign strategy, and remain current on campaign issues. Thus, the
20 salary payments are an expense necessary to the campaign that would not exist but for
21 the candidate’s need to engage in campaign activity. See Advisory Opinions 1996-34,
22 1995-42, and 1995-20 (which permitted the expenditure of campaign funds for child care
23 or family travel to enable the candidate and immediate family members to attend
24 campaign events).

candidate. In the Explanation and Justification to these regulations, the Commission, after discussing public comments both for and against such salaries, noted that it had failed to reach a majority decision on the issue by the required four affirmative votes. Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 *Fed. Reg.* 7862, 7867 (February 9, 1995). In two previous advisory opinions in which it considered the issue of candidate salary and committee payments of monthly living expenses, the Commission noted that it could not reach a decision on those issues. Advisory Opinions 1992-4 and 1992-1.

1 The Commission regards it as significant that your proposal is based on your
2 current occupation and level of income and is restricted to the recovery of lost income
3 that is directly attributable to the time you spend on the campaign. The self-limiting
4 aspects of your formulation ensure that you will not receive funds from the campaign that
5 you would not normally (or on average) have received from your usual occupation for the
6 hours worked. Moreover, the ceilings you have set on your overall income recovery (e.g.,
7 to account for pay periods during the campaign when your business income exceeds your
8 usual non-campaign income) ensure that the campaign will not be used as a vehicle to
9 raise your combined income above the average even though you have worked on both the
10 campaign and your general contractor business. Thus, the proposal will not be used as a
11 device to have the campaign enrich you in this respect and, thereby, exceed its purpose of
12 enabling you to be a candidate.

13 Another way in which the arrangement will avoid enrichment of the candidate by
14 the campaign is in the range of the proposed salary. Without setting a ceiling on what
15 would constitute a reasonable campaign salary for a candidate, the Commission does not
16 perceive the amounts proposed as being in excess of fair market value. In addition, the
17 proposed duration of the contract, including the winding down period, does not appear
18 unreasonable.

19 Also significant for the Commission's approval of the proposed arrangement is
20 the fact that it is pursuant to a contractual arrangement in advance of its performance. In
21 Advisory Opinion 1987-1, the Commission concluded that a candidate's claim for lost
22 wages from his committee at the end of the campaign was prohibited by section 439a.
23 The Commission indicated that the deficiency of the candidate's proposal was that the
24 committee had not "previously enter[ed] into any written agreement with [the candidate]
25 that provided for compensation in exchange for valuable services to the campaign."
26 Advisory Opinion 1987-1.

27 As indicated above, the Commission is aware that the salary will enable you to
28 pay for expenses for which the campaign committee could not directly pay. This,
29 however, is the natural result of a payment of salary to anyone providing services to a
30 campaign. The prohibition on the personal use of campaign funds applies to personal use

1 by anyone, not just the candidate. However, the mere fact that a campaign staff member
2 will ultimately use a campaign salary to pay for his or her personal expenses not related
3 to campaign activity, does not change the nature of the salary contract payments as lawful
4 campaign expenditures. See Advisory Opinion 1995-29. Similarly, your proposal entails
5 a contract with the committee providing for payment based on the time you provide
6 services for the campaign.

7 Based on the foregoing, the Commission concludes that your proposal for the
8 receipt of salary payments from your principal campaign committee, pursuant to a formal
9 contract, is permissible. These salary payments will be operating expenditures under the
10 Act, and the committee must itemize and report them. 2 U.S.C. §434(b)(4)(A) and
11 (5)(A); 11 CFR 104.3(b)(2)(i) and (4)(i). The Commission emphasizes that its
12 conclusion is based on the principles embodied in your proposal, as discussed above, and
13 does not constitute approval as to other candidate salary plans with material differences.
14 See 2 U.S.C. §437f(c); 11 CFR 112.5.

15 The Commission expresses no view regarding any tax ramifications of your
16 proposal, since such questions are outside its jurisdiction.

17 This response constitutes an advisory opinion concerning application of the Act
18 and Commission regulations to the specific transaction or activity set forth in your
19 request. 2 U.S.C. §437f.

20 Sincerely,

21
22
23 Scott E. Thomas
24 Chairman

25 Enclosures (AOs 1998-1, 1997-27, 1996-40, 1996-34, 1995-42, 1995-29, 1995-20,
26 1992-4, 1992-1, and 1987-1)
27
28
29