



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 11, 1989

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-27

Jon L. Bryan
215 Prince Avenue
Marstons Mills, MA 02648

Dear Mr. Bryan:

This responds to your letter dated October 18, 1989, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a Massachusetts statute prohibiting state employees from soliciting or receiving funds for a political campaign.

You state that you are employed by the Commonwealth of Massachusetts as a professor at Bridgewater State College, and you are a candidate for the U.S. House of Representatives from the 10th Congressional District of Massachusetts. You state that, as a member of the faculty union, you are considered to be a non-management employee. You describe Chapter 55, section 13 of the General Laws of the Commonwealth of Massachusetts as prohibiting a state or local employee, other than an elected official, from soliciting or receiving money for political campaign purposes. You ask whether the Act and Commission regulations preempt Chapter 55, section 13, and thus permit you "to directly solicit funds, other than from students of [your] college over whom [you] might hold influence."

The proscription cited by you is one part of section 13. The section sets out the basic prohibition on political activity by a state or local employee and then proceeds, in the remainder of the paragraph, to describe how the prohibition is to be invoked when that employee is a candidate who has organized a political committee. In order to explain the Commission's preemption power with precision as to section 13 and its application to the situation presented by you, the entire paragraph needs to be analyzed.

Section 13 of Chapter 55 of the General Laws of the Commonwealth of Massachusetts provides that no state or local employee, who is other than an elected officer, may "directly or indirectly

solicit or receive" a contribution "for the political campaign purposes of any candidate for public office or of any political committee, or for any political purpose whatever..." The section explicitly does not prevent such persons from being members of political organizations or committees. In addition, the section provides that the soliciting or receiving of a contribution by a "non-elected political committee" organized to promote the candidacy for public office of such an employee shall not be deemed to be a solicitation or receipt of a contribution by the employee, so long as no such contribution is solicited or received from a person, whom the employee knows, or has reason to know, has an interest in a matter in which the employee participated during the course of his employment "or which is the subject of [the employee's] official responsibility."¹

According to section 34 of Chapter 55, the provisions of Chapter 55 apply to "all public elections."²

Preemption of state laws pertaining to the conduct of Federal elections is addressed directly in the Act and Commission regulations and in the legislative history of the Act. The Act provides that its provisions, and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453. Commission regulations specify that Federal law supersedes state law concerning the organization and registration of political committees, disclosure of receipts and expenditures by Federal candidates and committees, and limitations on contributions and expenditures regarding Federal candidates and committees, but the Act does not supersede state law with respect to the manner of qualification of candidates, dates and places of elections, voter registration, voting fraud, or candidates' personal financial disclosure. 11 CFR 108.7(b) and (c).

The report of the House committee that drafted the statutory provision explains the committee's intent in sweeping terms. Federal law is to be "construed to occupy the field with respect to elections to Federal office" and is to be "the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). The Conference Committee report on the 1974 amendments to the Act states that "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The other areas listed were later enumerated in the Commission regulations.

In accordance with the intent of Congress, the Act is the sole source of regulation of campaign financing for Federal elections, including limitations and prohibitions on contributions. The Act prescribes limitations on contributions by any person, including individuals, and completely prohibits contributions by certain specified persons, i.e., national banks, corporations and labor organizations using their treasury funds, foreign nationals, and government contractors. The intent of Congress, however, was that the regulatory scheme should not extend into the area of state laws regulating the political activities of state and local employees, i.e., the "little Hatch Acts." The House Committee Report, in discussing amendments to Title 5, which were part of the 1974 amendments to the Act, stated that the regulation of political activities of State and local employees "would be left largely to the States." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 11 (1974); see also H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 102 (1974). During the

Senate debate on the 1974 amendments, subsequent to the issuance of the Conference Report, Senator Stevens and Senator Cannon clarified that point. Senator Stevens stated:

It is my understanding, and I should like to ask the manager of the bill, my friend from Nevada (Mr. Cannon), if he agrees that this means that State laws which prohibit a State employee, or local laws which prohibit a local employee, from engaging in Federal campaign activities and Federal campaigns are still valid?

120 Cong. Rec. S18538 (daily ed. October 8, 1974).

Senator Cannon replied that Senator Stevens' understanding was "absolutely correct." Id.

The Commission concludes that the first portion of section 13, insofar as it relates to a solicitation by the employee himself or herself or the personal receipt by the employee, is not preempted by the Act. This portion of the section, if restricted to such personal activity, fulfills the purpose of a little Hatch Act in regulating the political activity of a state employee.

This prohibition, however, should not extend beyond the particular state employee. Although section 13 appears to be aimed at regulating the political activities of a state employee, the language of the section also prohibits the political committee of the employee from accepting contributions from a certain group of persons, i.e., any persons whom the employee knows or has reason to know has an interest in matters in which the employee has participated or which are the subjects of the employee's official duties. By doing so, it is regulating in an area that Congress clearly intended for the Act to cover, i.e., the source of campaign funds. The Act does not include persons in the above-described group among those who may not contribute to candidates for Federal office. In several advisory opinions, the Commission has indicated that the Act permits any person, who is not otherwise prohibited by Federal law from doing so, to make a contribution within the Act's limits in a Federal election. See, e.g., Advisory Opinions 1984-26 and 1979-28. Even when a part of a state statute may appear, upon its surface, to be aimed at behavior of a state official or employee outside the area of campaign financing, the Commission has interpreted its broad preemptive powers to be applicable. Advisory Opinion 1989-12; see also 1988-21. The Commission concludes that the portion of section 13 relating to the solicitation and acceptance by a political committee of contributions to influence a Federal election is preempted.

The Commission notes that the statute uses the phrase "directly or indirectly solicit or receive," with reference to the activity of the state employee. Insofar as the phrase "indirectly" relates to the solicitation or receipt of contributions by those involved in the campaign acting at the direction of a candidate who is a public employee, section 13 extends beyond regulation of the political activities of the state employee into the conduct of his or her campaign. Once a person is permitted by state law to be a candidate for Federal office, such a restriction would directly impinge upon the ability of the campaign or political committee to conduct otherwise lawful campaign finance activity and would directly contravene the intent of the Act to occupy the field with respect to "the conduct of Federal campaigns." H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974).

Section 13, therefore, is preempted, in part, as it relates to Federal elections. The restrictions on the ability of your political committee to solicit or receive contributions otherwise permitted under the Act are preempted. Similarly, the restrictions on indirect solicitation or receipt by you of contributions are preempted insofar as the contributions are solicited or received by those in the campaign acting at your direction. The Act, does not, however, preempt the section's proscription on direct solicitation of contributions by you or your personal receipt of contributions.

This response constitutes an advisory opinion concerning application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosures (AOs 1989-12, 1988-21, 1984-26, and 1979-28)

1/ The text of Chapter 55, Section 13, of the Massachusetts General Laws, as amended, is as follows:

No person employed for compensation, other than an elected officer, by the commonwealth or any county, city or town shall directly or indirectly solicit or receive any gift, payment, contribution, assessment, subscription or promise of money or other thing of value for the political campaign purposes of any candidate for public office or of any political committee, or for any political purpose whatever, but this section shall not prevent such persons from being members of political organizations or committees. The soliciting or receiving of any gift, payment, contribution, assessment, subscription or promise of money or other thing of value by a non-elected political committee organized to promote the candidacy for public office of a person so employed for compensation by the commonwealth or any county, city or town, shall not be deemed to be a direct or indirect solicitation or receipt of such contribution by such person; provided, however, that no such gift, payment, contribution, assessment, subscription or promise of money or other thing of value may be solicited or received on behalf of such a person from any person or combination of persons if such person so employed knows or has reason to know that the person or combination of persons has an interest in any particular matter in which the person so employed participates or has participated in the course of such employment or which is the subject of his official responsibility. Any appointed officer or employee convicted of violating any provision of this section may be removed by the appointing authority without a hearing. Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars.

G.L. c. 55, 13.

2/ Section 34 states, in pertinent part:

Sections one to thirty-three, inclusive, shall apply to all public elections and to elections by the general court and by city councils and by either branch thereof and, so far as applicable, to the nomination by primaries, caucuses, conventions and nomination papers of candidates to be voted for at such elections.

G.L. c. 55, 34.