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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

JAN 20 8 01 AM '99

January 19, 1999

Federal Election Commission
Office of General Counsel
999 E. Street, NW.
Washington, DC 20463

AOR 1999-01

Attn: Lawrence M. Noble
C/o Bradley N. Litchfield

Dear Mr. Noble:

This refers to your letter dated January 19, 1999, concerning further clarification of my advisory opinion request. In the interest of brevity I will respond point-by-point, so trust that the referred correspondence from your office is at hand.

(1) Yes, "Y" is based on the number of hours spent on campaign activities in a given period, presuming a standard forty-hour workweek as 100%. This would be the maximum number of weekly hours credited for recovery, regardless of actual hours spent or pay period selected.

(2) While I expect that, given the choice, my recovery period would be semi-monthly, I believe the claimant should be allowed to select from weekly, semi-monthly, or monthly, and that such selection should be specified in the contract and could not be modified during the term of the contract. Regardless of the pay period, all would be based on a standard forty-hour week:

1 year = 2080 hours = 100%
1 month = 173 / 40 = 4.33 = 100%
1/2 month = 87 / 40 = 2.17 = 100%

(3) I believe that your restatement of the formula is accurate with the following clarifications: (a) "business income" should be changed to "salary or wages," to prevent the downturn in a candidates investment portfolio from being a claimable loss. In other words, the loss should be reasonably tied to a correlation between time/effort and earned compensation. There should not, however, be any pre-set dollar limitation on claimable or recoverable loss, so that a highly compensated professional should have equal access to claims under this provision in accordance with equal protection principles.

Formula : Recoverable loss = $r\% \cdot (p - c)$ where
 h = hours spent campaigning
 $r = 2.5h < \text{or} = 100$ (excess above 100 to be disregarded)
 p = average periodic pre-campaign salary or wage
 c = current actual periodic salary or wage

(4) Examples:

p = 5,000.00/mo
 h = 80 $80 / 4.33 = 18.47$
 c = 2,000.00
 $r = 2.5 \cdot 18.47 = 46\%$

$46\% \cdot (5,000.00 - 2,000.00) = \$1,380.00$ maximum recoverable lost wages.

Candidate should have spent more time either working or campaigning.

p = 5,000.00/mo
 h = 240 $240 / 4.33 = 55.43$ (100% = 40)
 c = 8,000.00
 $r = 2.5 \cdot 40 = 100\%$

$100\% \cdot (5,000.00 - 8,000.00) = <-\$3,000.00>$ maximum recoverable lost wages.

This example has highlighted a potential missing component to the formula that the Commission might ultimately compose; namely that another test might be added to the process. This would simply be that at the time of claim the claimant would need to show a net loss in aggregate over the entire term of the contract or from the date of first claim, as well as in the specific claiming period.

Because claims under this plan would be made against actual losses incurred, rather than in anticipation of such losses, it would be virtually impossible to "get ahead." In response to your query, however, in the example cited and solved above the monies would indeed be owed the campaign by the claimant/candidate, at least to the degree that no future claim could be paid unless or until the candidate's losses had eliminated the excess and both a periodic and aggregate contract-term loss could be demonstrated. In effect, the candidate would be virtually "locking-in" his or her earned income level for the term of the contract or of claims thereunder.

Again, I appreciate your attention and diligence, and look forward to hearing from you soon.

Regards,



Mark Greene
 Cc: file



FEDERAL ELECTION COMMISSION

Washington, DC 20463

January 19, 1999

Mark Greene
10149 Stoneleigh Drive
Benbrook, Texas 76126-3024

Dear Mr. Greene:

This refers to your letters dated December 30, 1998, and January 12, 1999, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to your possible receipt of a salary from your principal campaign committee if you become a Congressional candidate for the 2000 election cycle.

In a phone conversation on January 12, Jonathan Levin, an attorney in this office, asked you to specify the proposed monthly salary terms. Your letter of January 12 provides a formula which would be used to determine your salary for a given period. Your formula is as follows: $\text{period reimbursement} = r\% \times (p - c)$. The "r" figure equals 2.5 times the number of campaign hours worked. 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. You have described this formula as involving "a multiple of time spent on campaign activities in a period and total earned income lost due to campaign activities."

To ensure a clear understanding of the proposed formula, please explain in more detail the basis of the formula and provide responses to the following requests for information:

- (1) Please clarify that the "r" amount is based on the number of hours worked in a week and that the maximum campaign hours credited would be at a rate of 40 hours per week.
- (2) Please clarify whether the salary payment will be made monthly or weekly. If the salary is to be paid monthly, state whether you are making a calculation based on each 40-hour week (within the month) at a time, or whether you are basing it on the month as a whole, that is, 160+ hours.

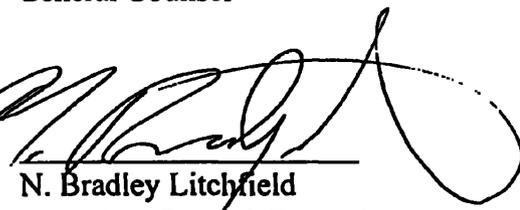
(3) Please clarify whether the following is an accurate explanation or restatement of your formula. The amount of lost business income that the campaign will pay to you is the amount of the difference between your average business income and your actual business income for that time period, times the percentage of a full-time work period (40 hours per week) that you worked for the campaign. The salary from the campaign for that period cannot exceed your average business income for a period of the same length.

(4) Please provide examples that will illustrate the application of your formula based on the assumption that your average monthly business income when not campaigning is \$5,000. Include in such examples, a situation where you would work 80 hours on the campaign in a given month but earn only \$2,000 in business income. Provide an example where you would work 240 hours on the campaign in a given month but earn \$8,000 in business income. For each of these two examples, you should state the salary amount (if any) that would be paid to you by the campaign and indicate the payment schedule for the salary amount. With respect to the latter example, you should also explain whether a total of \$3,000 would be deducted from any campaign salary payments owed in future months. You may also provide illustrative examples of business and campaign work patterns that, you believe, will be more typical than the two situations specified herein.

Upon your receipt of your responses to the above requests for information, this office and the Commission will give further consideration to your inquiry as an advisory opinion request. If you have any questions about the advisory opinion process or this letter, please contact Mr. Levin at 202-694-1650.

Sincerely,

Lawrence M. Noble
General Counsel

BY: 
N. Bradley Litchfield
Associate General Counsel

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10149 Stoneleigh Drive
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817-249-3190 FAX 817-249-8072

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OFFICE OF GENERAL
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JAN 19 3 05 PM '99

January 12, 1999

Federal Election Commission
Office of General Counsel
999 E. Street, NW.
Washington, DC 20463

Attn: Bradley N. Litchfield

Re: Clarification/AO Request 12/30/99

Mr. Litchfield:

I'm writing in response to a phone conversation earlier today with your associate Jonathan Levin. Please let me know as soon as possible if these clarifications are sufficient for your purposes, as my "campaign" is on hold pending the resolution of this matter.

To clarify paragraph 2 of my December 30 request: the contractual relationship referred to would and should be a formal written contract between the candidate as an individual and the committee as an organization. At a minimum, the contract should contain an expiration date no more than 90 days beyond the general election, which period should be sufficient to allow the candidate to assist his committee in putting the books formally to bed and to fully resume whatever mode of economic survival he/she had engaged prior to the campaign and election. Regarding amounts of reimbursement, it seems that a simple formula could be arrived at which would be a multiple of time spent on campaign activities in a period and total earned income lost due to campaign activities. (see following)

h = campaign hours worked (verify)
 r = 2.5 h (less than or equal to 100)
 p = avg. period pre-campaign salary/wage
 c = current period salary/wage

period reimbursement = $r\% \cdot (p - c)$

My intention and expectation is for this ruling to affect lost earned income such as wages or salary which loss could be reasonably attributed to time campaigning for office instead of pursuing other income-producing activities. Inclusion of tax returns for the past two years should prove sufficient to establish the average monthly income that a candidate might seek reimbursement for under this ruling. It was this aspect which occasioned my perhaps confusing use of the term "taxable income" in my initial request. Claims with

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back-up would be made per period (weekly or monthly, presumably). The contract, tax returns establishing eligible income, claim forms and payment receipts would be part of committee filing documents. All income obtained hereunder would of course be taxable as ordinary income.

As to the anticipated duration of this contract, having defined the closing date, the only question is the commencement. In my particular case, while I don't intend or expect to exercise this recovery prior to the May primary, I would hope that I and other candidates would be able to, if necessary. Again, it must be noted that in the rare event of challenged incumbents within a party, the challengers are from the outset at sufficient disadvantage by virtue of the lack of incumbency. It is blatantly prejudicial to eliminate challengers or force them to the brink of bankruptcy during either primary or general campaigns while the incumbents enjoys tax-payor supported financial security. It seems only appropriate that from that point in time and process wherein a candidate becomes subject to Federal election laws, this Federally assured contractual right of recovery should be available.

In closing, Mr. Levin suggested that I "flesh out" paragraph 3 of my initial request, although I'm not certain why. I would hope that the merits of my request were sufficient to warrant a ruling that would have a general and equal effect were I an attorney or an artist, a bricklayer or a bridal consultant. In other words, if you find favorably based on fairness principles, the individual circumstances of the candidate don't and shouldn't matter. Nonetheless, if it will assist your decision making somehow, I will tell a bit about my business.

I am a small independent general contractor engaged primarily in remodeling and tenant-finish work. My annual sales volume, up about 15% annually, is approximately \$275,000 for 1998, despite far too much time having been spent on political activities in my role as party activist, precinct chair and election judge. It is no doubt a result of these activities that has left me in a first quarter lull for the first time in years. (But for which I'm not claiming reimbursement). This volume produces a pre-tax average \$5,000/mo. approximately. Here in Texas, construction runs year-round, and is only slightly slower in winter months. As I've had \$50,000 Decembers and \$2,000 Junes, as well as the opposite, to arrive at an average in my case on any formula other than 2-year pre-tax net/24months would be a vain exercise. I'm certain for some candidates in some trades/professions this might not be the case, although I think in the vast majority of cases it would prove a fair formula.

I hope the above clarifies sufficiently for your purposes the various areas under consideration. If not, please contact me soonest, and I will attempt to elucidate further.

Respectfully,


Mark Greene

Cc: file/

Mark Greene
10149 Stoneleigh Drive
Benbrook, Texas 76126-3024

December 30, 1998

Danny L. McDonald/Chairman
Federal Election Commission
Office of General Counsel
999 E. Street, NW.
Washington, DC 20463

Sir:

This correspondence is a request for an advisory opinion under Sec.112.1,U.S.C. 437f. In anticipation of filing this request I have undertaken review of your advisory opinions 1992-1 and 1992-4, which your office suggested were similar in nature, and which I concur share certain aspects with my current inquiry.

I am in the initial stages of formulating a campaign for a seat in the U.S. House of Representatives 2000 election, which would require the raising of more than \$1,000,000, significant campaign time leading up to the primary elections, and 60-plus hours per week of steady campaigning between the May primary and November general election. For this reason it is my intention to establish a contractual relationship with my campaign committee to receive a salary sufficient to offset lost business revenues due to campaign activities, specifically but not exclusively during the period leading up to the general election.

As a brief overview of my personal financial situation, I am a small businessman, dedicated husband and father of two young children generating household taxable income of approximately \$5,000/mo, with household expenditures of approximately \$4,500/mo. These expenses include mortgage and auto payments; life, health, auto, homeowners, professional liability insurance; property taxes, utilities, groceries, debt service, clothing, uninsured medical expenses, etc., all of which I would be happy to document for you if you so desire. In other words, just an average hard-working American taxpayer. At this time I don't foresee either a lottery win or inheritance upcoming to drastically alter this picture.

In reviewing the above referenced opinions, it appears that the Commission is holding that there is no legal and ethical means whereby an average citizen, the modern equivalent of the 18th century "yeoman farmer," can realistically challenge an incumbent and run for office. (To pay one's spouse appears legal, yet specious.) Only a candidate with enormous personal wealth and leisure time, or lacking the standard commitments of business and family demands can afford to commit fully to such a daunting enterprise.

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In requesting that you revisit this area of inquiry, I would ask that you look specifically at your reliance on the definition of the funds in question as "excess campaign contributions," which according to literature obtained from your office are defined as "contributions and assets which a campaign determines are in excess of the amount necessary to defray campaign expenditures." I respectfully submit that the full-time services of a candidate are an absolute necessity to any campaign, and that if the only means of acquiring such necessary services is the utilization of campaign funds to offset lost income, that the funds in question are by no means "excess," and should not be considered as such.

I can assure you that such offsetting funds are vital to the plausibility of my campaign personally, and would be included in both fund-raising strategies and expenditure budgeting projections. I am further aware that such expenditures, even if ruled acceptable, may create a political liability that I would have to overcome. That concern, however, should be mine and mine alone, and not a consideration of the Commission. The barring of such expenditures, however, is indeed the Commission's concern, and seems to me a potential constitutional infringement under both the free-speech clause of the 1st Amendment and the equal protection clause of the 14th Amendment. While I am aware that Art.I.,Sec.4 of the Constitution gives Congress broad powers to regulate the electoral process, which regulations are clearly designed to protect incumbents and discourage challengers, in this case I'm doubtful that the courts would in good faith find in favor of incumbent candidates receiving taxpayer-funded salaries in excess of \$10,000/mo. throughout the campaign period, while promulgating regulations barring average citizens equal rights to participate in the process and in effect stifling their political speech.

Given the above considerations, it is fortunate that it is the Commission and not the Congress charged with interpreting and enforcing the Code. In my scant readings of some of your findings, you do seem to be open-minded, fair and non-partisan in your rulings, so I feel confident you will recognize the merits of this inquiry. I feel if a ruling in my favor and that of other would-be challengers is issued, that it would not be inappropriate for the commission to require detailed documentation of the transaction, including but not limited to verification of the lost income being offset, as well as a certified recording of the contract between the candidate and his/her campaign committee as a campaign document of record.

I look forward to your reply, and am available for consultation by correspondence to the above address, by phone (817)249-3190, or by FAX (817)249-8072.

Respectfully,



Mark Greene

cc: file/