



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 25, 1999

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-1

Mark Greene
10149 Stoneleigh Drive
Benbrook, Texas 76126-3024

Dear Mr. Greene:

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

I. Salary Proposal

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

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

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

You propose a salary formula in the contract that would provide that the campaign would pay you the amount of normal wages or salary that you would lose as a result of the time you spent on the campaign. The formula is restated as follows: 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 (based on 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. Although your calculations will be based on the concept of a forty-hour work week, the contract will most likely provide for payment on a twice a month basis, and this term will not be modified during the term of the contract.¹

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

Under your formula, the combined business income and campaign salary for a relevant time period cannot exceed your average income for a non-campaign time period of the same length. If your business income happens to exceed that amount in a time period (e.g., you earn \$3,500 in business income in a half-month), the campaign would

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.

not pay you any salary until the candidate's losses, under the formula for the succeeding pay periods, had eliminated this excess. In addition, for you to receive any salary payment from the campaign, you would also need to show an aggregate loss over the past periods covered by the contract.

II. Legal Analysis

The Commission has historically recognized that candidates have wide discretion in making expenditures to influence their election. However, the Act prohibits the conversion of campaign funds to personal use. 2 U.S.C. §439a; 11 CFR 113.2(d); see also Advisory Opinions 1998-1, 1997-27, 1996-40, and 1995-26. Commission regulations at 11 CFR 113.1(g) define personal use for the purposes of this prohibition. Generally, personal use is "any 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(g). The rules list certain uses of campaign funds that will be considered *per se* personal use. 11 CFR 113.1(g)(1)(i). Under this regulation, personal use includes the use of funds in a campaign account for the following purposes: household food items or supplies; funeral, cremation or burial expenses; clothing; tuition payments not associated with training campaign staff; mortgage, rent or utility payments for the personal residence of a candidate or his family; admission to sporting events, concerts, or other forms of entertainment, unless part of a specific campaign or officeholder activity; dues, fees or gratuities to a country club, recreational facility, or other nonpolitical organization, unless they are part of the costs of a specific fundraising event on the organization's premises; and salary payments to family members, unless they are fair market value payments for *bona fide*, campaign-related services.³ Other uses of campaign funds are to be examined on a case by case basis using the general definition of personal use. 11 CFR 113.1(g)(1)(ii).⁴ These include, but are not limited to, expenses for legal costs, meals, travel, and vehicle costs.

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 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).

You have indicated that the basis for your request is your need for income to pay the expenses that you list above. A number of these expenses, payments for mortgage, utilities, groceries, and clothing, fall within the category of *per se* personal use. The other expenses will exist regardless of whether you become a candidate and are distinguishable from such costs as travel expenses or child care where these costs are incurred in order to enable the candidate and immediate family members to attend campaign-related events. See Advisory Opinions 1996-34, 1995-42, and 1995-20. In effect, you are proposing that your campaign committee do indirectly what it cannot do directly; i.e., pay for expenses that are not related to your campaign.

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

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

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

such as travel to campaign events and additional child care related to those events. See, e.g., Advisory Opinion 1995-42.

Based on the foregoing, the Commission concludes that you may not receive a salary from your campaign committee.

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

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures (AOs 1998-1, 1997-27, 1997-1, 1996-40, 1996-34, 1995-42, 1995-26, 1995-20, 1992-4, 1992-1, 1985-30, and 1983-27)