THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE
ONE ASHBURTON PLACE, ROOM 411
BOSTON, MASSACHUSETTS 02108
(617) 727-8352
(800) 462-OCPF

MARY F. McTIGUE
DIRECTOR

September 24, 1991
AO-91-20

Cheryl Cronin, Esq.
Dwyer, Collora & Gertner
Attorneys At Law
400 Atlantic Avenue
Boston, MA 02110

Re: M.G.L. c.56, s.37

Dear Ms. Cronin:

This letter is in response to your July 11, 1991, letter requesting an advisory opinion regarding the application of the above referenced statute to your client, the Campaign for Massachusetts Future (CMF).

You have stated that CMF employed Geoffrey Beckwith as its campaign manager in June, 1990. Mr. Beckwith, who was, at the time, a member of the General Court, agreed to postpone receipt of any salary because of questions raised by M.G.L. c.56, s.37. CMF now has an outstanding liability to Mr. Beckwith. This debt is reflected on campaign finance reports filed with this Office and represents reasonable compensation due Mr. Beckwith for his significant responsibilities as campaign manager and the thousands of hours he devoted to his duties over a six month period. CMF was extremely pleased with Mr. Beckwith's performance and is concerned that failure to pay debts to campaign staff could have a negative impact on its ability to hire talented individuals to work on future campaigns.

You believe that an expenditure for Mr. Beckwith's salary would be consistent with Massachusetts campaign finance laws and regulations, specifically 970 CMR 2.05(2)(i) but have noted the existence of M.G.L c.56, s.37 which arguably prohibits

payment to Mr. Beckwith. You have asked this Office's opinion regarding this matter.[1]

For the reasons set forth below, it is the opinion of this Office that the payment of a reasonable salary to Mr. Beckwith for managing CMF's campaign is permissible under the campaign finance laws, including M.G.L. c.56, s.37.

M.G.L. c.55, s.6 provides, in pertinent part, that committees such as CMF:

> may . . . expend money . . . for the enhancement of the political future of the . . . principle, for which the committee was organized . . . [subject to] reasonable rules and regulations concerning such expenditures . . .

970 CMR 2.05(2) which is applicable to CMF by virtue of 970 CMR 2.06(3) provides that various expenditures "not inconsistent with 970 CMR 2.00, M.G.L. c.55 or any other law shall be permitted by political committees." Such expenditures include:

> (i) Campaign staff and consultants. Such individuals may be compensated in a reasonable manner solely for work actually done for that political committee. (emphasis supplied)

Therefore, the employment of a campaign manager and reasonable compensation for such employment is a permitted expenditure. You have asked in Mr. Beckwith's case, however, whether such payment is prohibited by M.G.L. c.56, s.37. Section 37 provides, in pertinent part:

> No member of the general court . . . shall promote or oppose, for a valuable consideration other than

---

1. By Memorandum dated August 29, 1990, this Office advised interested parties that it did not enforce the provisions of M.G.L. c.56, s.37. While it is correct that enforcement of section 37 remains the responsibility of the Attorney General or District Attorney, this Office is responsible for determining the legality of all reports and actions required to be filed or taken "pursuant to [chapter 55] or any other laws of the commonwealth pertaining to campaign contributions and expenditures." Therefore, the Office has authority to determine the legality of the proposed expenditure. The Office also is required to respond to request for advice regarding campaign finance matters pursuant to M.G.L. c.55, s.3. It is within this context that this Office is responding to your request. See also Assistant Attorney General William P. Lee's May 10, 1991, letter to Cheryl Cronin recommending that you contact this Office regarding this matter.

> reimbursement for expenses actually incurred, the acceptance by the voters . . . of any law or proposed law or constitutional amendment submitted under Article XLVIII of the amendments to the constitution, or an expression of opinion by the voters on any question of public policy.

Admittedly, a casual reading of this statute suggests that Mr. Beckwith could not be legally compensated for the work performed as CMF's campaign manager. For the reasons set forth below, however, this Office considers the payment of a reasonable salary a permissible expenditure under M.G.L. c.55 and not prohibited by section 37.

First, if section 37 is construed as prohibiting all reasonable compensation, it would probably violate CMF and Mr. Beckwith's constitutional rights under the First Amendment.

In a long line of cases beginning with Buckley v. Valeo, 424 US, 46 L.Ed 2d 659, (1976) the Supreme Court has made it clear that the sole judicially acceptable basis for restricting campaign finance activities is to prevent corruption or the appearance thereof. Almost as frequently, the Supreme Court has stated or indicated that the concern over corruption in candidate elections is just not present in ballot question elections. See First National Bank of Boston v. Bellotti, 435 US 765, 98 S.Ct. 1407, 55 L.Ed. 2d 707, (1978). Moreover, as the Court stated in Bellotti at 784-785:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which person may speak and the speaker who may address a public issue.

It is clear that prohibiting certain people from receiving payment for their work significantly limits the ability of a political committee to obtain the services of the person whom the committee believes can most effectively communicate its message. This point was recognized by the Supreme Court in Meyer v. Grant, 108 S.Ct. 1886 (1988) in upholding a decision of the Tenth Circuit Court of Appeals striking down a Colorado statute prohibiting the use of paid petition circulators. "We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay." Meyer at 1893.

While the Supreme Court has recognized that limitations may be placed upon public employees participation in the electoral process, such limitations must be narrowly tailored to achieve a compelling state interest. Such an interest has been recognized in supporting the federal Hatch Act and so-called state mini-Hatch Acts which prohibit public employees from various kinds of partisan activities. See Broadrick v.

Oklahoma, 413 US 601, 93 S.Ct. 2908, 37 L.Ed. 830 (1973) and Civil Service Commission v. Nat'l Ass'n of Letter Carriers, 413 US 548, 93 S.Ct. 2880, 37 L.Ed. 796 (1973) and their progeny. However, the First Circuit has indicated that such prohibitions are almost certainly unconstitutional in nonpartisan candidate elections. See Magill v. Lynch, 560 F.2nd 22, 26 (1st Cir. 1977) and Mancuso v. Taft, 476 F.2d 187, 200 (1st Cir. 1973). A fortiori, such proscriptions would be unconstitutional in ballot question elections.[2]

The above discussion concerns only a limited analysis of CMF's and Mr. Beckwith's First Amendment rights. There are additional equal protection concerns under the Fifth Amendment. For example, Mr. Beckwith is not prohibited from serving as campaign manager for another candidate's election (where the state has, at least, a recognized interest in the quid pro quo between candidates and citizens) but only ballot question elections.

For the above reasons, it is this Office's opinion that a construction of section 37 which prohibited payment of a reasonable salary to Mr. Beckwith would almost certainly be unconstitutional. However, this Office does not construe (as noted below) section 37 to prohibit such payment.

Section 37 was originally enacted by Chapter 196 of the Acts of 1919 and has remained relatively unchanged since that time. Chapter 537 of the Acts of 1946 inserted through section 10, a new M.G.L. c.55 and through section 11, a new M.G.L. c.56 including the present version of section 37. Section 37 comes within a portion of the 1946 legislation which was designated as "Certain Practices Forbidden". The preceding three sections which also concern public official and employees are concerned with promising public appointments or using official authority to coerce another political action. Clearly, section 37 as well as the statutes which precede it are concerned with the abuse of official power. Read in this light, it is the Office's opinion that section 37 does not prohibit reasonable compensation for services actually rendered but does, however, prohibit payment of exorbitant or unreasonable amounts (unrelated to the value of actual services provided) designed to obtain public promotion or opposition of a ballot question

---

2. See opinion letter dated August 24, 1990, from Stuart A. Kaufman, Chief of the State Ethics Commission Legal Division. In that letter, Mr. Kaufman concluded that Mr. Beckwith's then prospective employment with CMF would not violate M.G.L. c.268A, the conflict-of-interest law. It would be anomalous, indeed, to argue that the state has a compelling interest in prohibiting payment to Mr. Beckwith when the state's Ethics Commission has concluded that no conflict-of-interest exists.

from an otherwise unwilling or uninterested legislator or public employee.

The Office believes that such an interpretation is justified for a number of reasons. First, this statute is in pari materia with the other statutes noted above and, therefore, should be read together. I note that the Office's interpretation is not only consistent with these statutes but also with the expenditure provisions of M.G.L. c.55. Even if section 37 were considered to be unambiguous (interpreted to prohibit reasonable compensation), "if it would, considered alone, be unconstitutional, it may be construed with other statutes on the same subject in order to preserve its constitutionality." Sutherland Stat Const, s.51.01 (4th Ed). Similarly, even if the Office's interpretation were viewed as strained, it has also been concluded that "a strained construction is not only permissible, but desirable, if it is the only construction that will save constitutionality. Sutherland Stat Const, s.45.11 (4th Ed).

Based upon the above analysis, it is the Office's opinion that M.G.L. c.56, s.37 does not prohibit CMF from payment of its existing liability to Mr. Beckwith provided that such payment reflects reasonable compensation for services actually rendered to CMF in its ballot question campaign which are otherwise consistent with M.G.L. c.55.

This opinion has been rendered solely on the basis on the information provided in your letter and solely on the basis of M.G.L. c.55 and other relevant campaign finance laws. Because M.G.L. c.56, s.37 would be enforced by the Attorney General as noted infra, I have also reviewed this matter with Assistant Attorney General William P. Lee of the Attorney General's Elections Division who concurs with the Office's conclusion.

If you have further questions regarding this matter please do not hesitate to contact this Office or Assistant Attorney General Lee of the Attorney General's Office.

Very truly yours,

Mary F. McTigue

Mary F. McTigue
Director