



Commonwealth
of Massachusetts

OCPF Online
www.mass.gov/ocpf
Office of Campaign and Political Finance
One Ashburton Place, Room 411
Boston, MA 02108

Advisory Opinion

May 4, 2007
AO-07-04

Lisa Gibalerio
20 Chandler Street
Belmont, MA 02478

Re: Political Fundraising by Independent Contractor

Dear Ms. Gibalerio:

This letter is in response to your recent request for guidance as to whether you are a public employee for the purposes of M.G.L. c. 55, § 13, which prohibits political fundraising by such employees.

You have stated that you are the Warrant Committee Recording Secretary for the Town of Belmont. In that capacity, you take and distribute the minutes for Belmont's Warrant Committee (i.e., its finance committee). You started providing these services in January. You are compensated at an hourly rate of \$25.00 per hour, and receive no employment benefits such as insurance, a pension plan, vacation pay, or sick pay. The Town considers you an independent contractor and gives you a 1099 form, not a W2.

Although the times and dates of the meetings of the Committee are scheduled by the Town, you have flexibility as to when you draft and distribute the minutes. You report your hours to the Town Accountant and she reviews the minutes for you if you ask her to. Otherwise, you have no supervision. You work from home, use your own laptop computer both at home and at the meetings, and receive no administrative facilities or supplies from the Town. You distribute the minutes primarily by email, but also make copies on occasion using your own paper and printer. Your only client is the Town of Belmont, i.e., you do not prepare minutes for other entities, although you would provide similar services for others if the opportunity arises.

QUESTION

May you be involved in fundraising for a candidate without violating § 13 of the campaign finance law?

RESPONSE

Yes. The campaign finance law prohibits any individual "*employed for compensation*" by a governmental entity from directly or indirectly soliciting or receiving campaign funds on behalf of a candidate, political committee or for any other political purpose. See M.G.L. c. 55, § 13.

Section 13 is one of several provisions of the campaign finance law that “demonstrate a general legislative intent to keep political fund raising and disbursing out of the hands of nonelective public employees and out of city and town halls.” Anderson v. City of Boston, 376 Mass. 178, 186-187 (1978). The campaign finance law only applies narrowly to persons who are employed for compensation and not elected. Compare M.G.L. c. 268A, § 1, which covers all persons “performing services... whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis.” In determining whether an employment relationship exists for purposes of the campaign finance law, the office has stated that persons who provide services for a governmental entity but are independent contractors are not “employed for compensation.”¹

OCPF has advised that an independent contractor is a person who “contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.” See AO-93-24. The office has emphasized that important factors in the analysis include whether employment benefits are provided, and whether the worker sets his or her own hours, provides his or her own equipment and has other clients. See AO-98-05 (adult education teacher who set own hours, did not receive benefits and was not supervised or controlled by the town was an independent contractor), AO-95-26 (computer consultant with a state contract and other clients, who set his own hours, was not supervised or controlled by the state, and provided guidance on an as-needed basis was an independent contractor) and AO-04-05 (an attorney who provided services to the Commonwealth was an independent contractor since he was paid on an hourly basis, did not receive salary or benefits, set his own hours, provided his own equipment, supplies and facilities, continued to maintain an active private practice with other clients, and received an IRS Form 1099 from the Commonwealth indicating his status as a “nonemployee”).

These factors can be classified according to the following four categories.

(1) Lack of Control: (a) whether there is an ability to supervise the day-to-day work of the person, e.g., whether written or oral reports are required; and (b) whether the person provides services using his or her own approach without instruction and also dictates the hours that he or she will work on the job. If the person is subject to day-to-day control by the governmental entity, this suggests an employment relationship.

You have indicated that the Town does not control how you do your work of preparing and distributing minutes. Although you have to be present at the meetings that are scheduled by the Town, the actual work of preparing and distributing the minutes is done on your own schedule. You use your own laptop to prepare and distribute minutes. The Town does not provide training or instruction to you on how to complete the minutes. This important factor clearly suggests that you are an independent contractor.

¹ In addition, the office has stated that a poll worker, who is paid to perform services on only a few specific days during a year, is a public employee only on those election days when the work is done. See AO-95-37.

(2) Receipt of compensation and benefits, and employment classification: (a) receipt of regularly paid salary or wages; (b) receipt of employment benefits such as sick time and vacation time; and (c) the governmental entity's classification of the worker as an employee. These factors all strongly suggest an employment relationship.

You are paid per hour, do not receive employment benefits, and are classified by the Town as an independent contractor.

(3) Existence of an independent trade, occupation or business: (a) whether the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed; and (b) whether the worker is capable of performing the service to others or makes himself or herself available to others, or alternatively depends on a single employer for compensation.

Although you do not have other clients for whom you perform similar services, you are capable of providing services for others and would do this if the opportunity presents itself. We do not believe this test should be given undue emphasis in the circumstances where a person is providing services of the type involved here from home.

(4) Performance of work outside the usual course of the employer's business: (a) whether the work is done at the person's home or separate place of business, in contrast to it being performed in the governmental building; and (b) whether the person providing the services uses materials or resources provided by the entity.

Although you attend regularly scheduled meetings of the finance committee, which are held in a governmental building, you draft and distribute the minutes from home. You do not use a computer or paper provided by the Town.

In conclusion, the Town does not control your performance of services, and the relationship of the parties does not appear to be an employer-employee relationship. Although there is some ambiguity in the last two factors, since you are present at meetings of the Warrant Committee and you do not presently have clients other than the Town, these less substantial circumstances are not enough to support a conclusion that you are "employed for compensation" for purposes of the campaign finance law. Consequently, you are not subject to Section 13 and you may solicit and receive political contributions.

Please note that this opinion is issued solely within the context of the campaign finance law and is based on the representations made in your letter and to OCPF staff.

The determination of whether you or any other person is an independent contractor for purposes of the campaign finance law has no bearing on whether the person should also be classified as such for other purposes, e.g., for tax withholding or unemployment benefits determinations.

I encourage you to contact us again if you have further questions regarding any aspect of the campaign finance law.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Sullivan". The signature is written in a cursive style with a long, sweeping tail on the letter "n".

Michael J. Sullivan
Director

MJS/gb