

Department of Law
State of Georgia



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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2004 FEB 26 A 111.600

RE: FEC Complaint No. MUR 5402

Demonstration, pursuant to 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.6,
that no action should be taken on the complaint to the extent it involves the
State of Georgia

Dear Mr. Jordan:

I am writing on behalf of the State of Georgia in response to your letter of January 28, 2004 in which you requested a response to a complaint filed by George Anderson on January 7, 2004 alleging that "Bush-Cheney '04, Eric Tanenblatt, and the Office of the Governor of the State of Georgia" violated the Federal Election Campaign Act of 1971, as amended. The time for response to your letter has been extended up to and including February 28, 2004. The current response is made only on behalf of the State of Georgia; my understanding is that Bush-Cheney '04, Mr. Tanenblatt and the Office of the Governor will separately respond.

Initially, please be aware that the State of Georgia appears not to be a proper party respondent to the current action, MUR 5402, for several reasons. First, Mr. Anderson has not named the State of Georgia as a party to his complaint. His complaint is styled against the "Office of the Governor of the State of Georgia," (Complaint, emphasis added) which appears to have been inadvertently modified, in the correspondence by the FEC to the Georgia Attorney General, to "the Office of the Governor and the State of Georgia." (See letters of the FEC of January 16 and 28, 2004, emphasis added.)

Indeed, and secondly, Mr. Anderson could not properly have named the State of Georgia as a party to his FEC complaint. The Supreme Court has recently established that States cannot be made respondent parties to complaints made to federal agencies by private parties. *Federal Maritime Commission v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002). As the Court stated there:

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Simply put, if the Framers thought it an impermissible affront to a State's dignity to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the [Federal Maritime Commission].

535 U.S. at 760.

In this regard, the State is also not among the groups specifically enumerated within the definition of "person" under federal election campaign law, 2 U.S.C. § 431(11), but, rather, the term "State" is separately defined. 2 U.S.C. § 431(12). The compliance provisions applicable to Mr. Anderson's complaint concern only a "person" within the definition of the statute -- states are not mentioned as respondents -- and, indeed, the Eleventh Amendment would preclude enforcement of any adverse order by the FEC in district court against the State as a party in its own right. *See* 2 U.S.C. §§ 437g (enforcement procedure against a "person," including district court actions). Thus, respectfully, I must point out that the FEC lacks jurisdiction over the State of Georgia, to the extent it is or could be a party to Mr. Anderson's complaint.

Thirdly, to the extent that Mr. Anderson's allegations against the Office of the Governor or staff members of that office are correct, those allegations potentially establish violations of Georgia as well as federal law. *See, e.g.* O.C.G.A. §§ 21-5-30.2 (contributions by public agencies prohibited), 21-5-50 (financial disclosure requirements); *see also* Executive Order 01.13.03.01 ("Establishing a Code of Ethics for Executive Branch Officers and Employees," a copy of which is attached hereto as Exhibit "A").¹ The members of the Governor's Office were acting, if at all, in their individual capacities, and were not, and could not have been, representing the State of Georgia in violating the State's laws. It has long been established that a state cannot violate its own laws. *See Ex Parte Young*, 209 U.S. 123 (1908). When an officer of the state -- even one acting under color of his office -- violates that law, the officer is responsible for the violation in his individual capacity, not in his capacity as an official representative of the state. *Id.*

None of these rules prevent the FEC from taking enforcement action should Mr. Anderson's complaint prove meritorious; however, the persons against whom the enforcement action must

¹ The effect of this order is that, if Mr. Anderson's allegations are correct, the conduct of an employee in the Governor's Office not only potentially violated the laws of the State but also the policy as enunciated by the Governor's Office itself. It was, in short, not even colorably action of the State.

run are the persons responsible for the underlying violation of the law.² Mr. Anderson, who is a layman and accurately describes himself as an “ethics activist in the State of Georgia” (Complaint, p. 1), may not understand these subtle distinctions, but the facts that he alleges, if true, show misconduct on the part of individual persons, not the State. The substance of his allegations are that Eric Tanenblatt, an employee in the Governor’s Office, used state equipment and facilities during working hours to solicit financial and perhaps other support for the Bush-Cheney ’04 campaign. This conduct, if true, is patently the misconduct of an individual (perhaps at the direction of superiors, as Mr. Anderson alleges) and not a policy or custom of the State of Georgia.

Indeed, Georgia’s Attorney General independently received a complaint from Mr. Anderson alleging violations of Georgia law arising from the same nucleus of alleged conduct on which the current action, MUR 5402, is predicated. This office has begun an initial inquiry regarding the contents of that complaint and has not obtained sufficient factual information at this point to determine whether Mr. Anderson’s allegations, either to the FEC or to the Georgia Attorney General, have merit. It is this Office’s understanding, however, consistent with Mr. Anderson’s allegations to the FEC, that Mr. Tanenblatt has reimbursed the State for some, if not all, of the calls in question, and in so doing has characterized the calls as personal, rather than political, in nature. (See Complaint, p. 1.)

In addition, Mr. Anderson apparently bases his complaint, to the extent it can be said to be against the “State of Georgia” at all (again, the State is not identified as a respondent in its own name to his complaint, and, under the facts alleged, it is not a proper party), on the language of 2 U.S.C. § 431 (8)(A)(ii),³ which defines contribution to mean, “the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.” The problem with Mr. Anderson’s allegation, to the extent it may reach the State, is that the State was not paying Mr. Tannenblatt to render services

² For example, were an injunction to issue against the Office of the Governor for a violation of the federal election campaign laws due to misconduct of his staff members, as is alleged by Mr. Anderson, one would expect that injunction to run against this specific governor’s office and would not be enforceable against his successors, who had no part in the misconduct. This is the fundamental distinction between an individual and official capacity claim. *Cf. Kentucky v. Graham*, 437 U.S. 159 (1985) (elaborating the distinction). Of course, were the conduct of the Office of the Governor the official policy of the State (rather than contrary to law, as it allegedly is in the current case), then an FEC injunction would still be enforceable but against the Governor in his official capacity, not against the State in its own name. *Id.*

³ See Complaint, p. 4.

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without charge to a political committee. It was paying him, by Mr. Anderson's own allegations stated on pages 1 and 2 of his letter, as an employee of, and for services for, the State. Mr. Tanenblatt's alleged misuse of his office, if true, would clearly be outside the scope of his employment and not the type of conduct 2 U.S.C. § 431 reaches.

For the reasons described above, the Attorney General's position is that the State of Georgia is not a proper party to the current proceedings and that the facts as alleged by Mr. Anderson show that no action should be taken on the complaint to the extent it involves the State of Georgia.

I appreciate your consideration of the above.

Sincerely,



STEFAN RITTER
Senior Assistant Attorney General

Enclosure

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