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Federal Election Commission
Washington, DC 20463

2004 MAY -6 A II: 45

MEMORANDUM

TO: The Commission

SENSITIVE

THROUGH: James A. Pehrkon
Staff Director

FROM: Allan D. Silberman
Director, ADR Office

BY: Lynn M. Fraser
Assistant Director, ADR Office

SUBJECT: Recommendation to Close the File on ADR 161

DATE: May 5, 2004

On March 24, 2004, the ADR Office ("ADRO") received MUR 5402 from OGC/CELA to review and determine its appropriateness for ADR processing. Based on that review, we determined that the case, ADR 161 is inappropriate for ADR and recommend that the case be closed. Following the procedures approved by the Commission on March 3, 2003, this matter will be closed by ADRO if the Commission approves the recommendation in this memorandum. The Office of General Counsel (OGC) concurs in the description of this matter and also concurs that it will not be returned to OGC for further action.

ADR 161/MUR 5402: Complainant alleges that Respondent Tanenblatt, Chief of Staff for the Governor of Georgia, used equipment and space in the Office of the Governor to make fundraising-related telephone calls on behalf of Bush-Cheney '04, Inc. The complaint further alleges that Respondent Tanenblatt was an employee paid by the State of Georgia at the time these calls were made. Complainant contends that these fundraising activities result in an in-kind contribution from the Governor of Georgia, the State of Georgia, and/or Respondent Tanenblatt as defined in 2 U.S.C. § 431(8)(A)(ii). As Respondent Tanenblatt had previously contributed the maximum allowed under the FECA to Bush-Cheney '04, Inc., Complainant contends any in-kind contribution from him would result in an excessive contribution.

Respondents Tanenblatt, Bush-Cheney '04, Inc. and Treasurer Herndon contend that Respondent Tanenblatt did not make fundraising calls during work hours, and therefore, there was no in-kind contribution to Bush-Cheney '04, Inc. resulting in an excessive contribution. Respondents the Governor of Georgia and the State of Georgia contend that they have been improperly named as Respondents based on a US Supreme Court decision

which found that states and their agencies cannot be made respondent parties to complaints filed with federal agencies by private parties.

Attached for the Commission's review is the ADR *Case Analysis Report* (CAR) on ADR 161, along with copies of the EPS Rating and ADR Rating reports.

Recommendation: We recommend that ADR 161/MUR 5402 be closed and the appropriate letters sent.

ADR CASE ANALYSIS REPORT

ADR Case: 161

Respondents:

1. Eric Tanenblatt
2. Bush-Cheney '04, Inc.
David Herndon, Treasurer
3. State of Georgia
4. Office of the Governor (GA)

OGC Case Open Date: 01/12/2004

Respondents' Reps.:

1. J. Randolph Evans, Esq.
2. Thomas Josefiak, Esq.
3. Robert S. Highsmith, Jr., Dpty. Executive Counsel
4. Stefan Ritter, Senior Assistant Attorney General

Date Forwarded to ADRO: 03/24/2004

Committee Name: Bush-Cheney '04, Inc.

Date Reviewed by ADRO: 04/27/2004

Committee Type: Authorized

District #/or State: N/A

Election - Won/Lost: N/A

Election Cycle: 2004

Summary of Complaint: Complainant, a self-proclaimed ethics activist from the State of Georgia, alleges that Respondent Tanenblatt, Chief of Staff for the Governor of Georgia, used equipment and space in the Office of the Governor to make fundraising-related telephone calls on behalf of Bush-Cheney '04, Inc. The complaint further alleges that Respondent Tanenblatt was an employee paid by the State of Georgia at the time these calls were made. Complainant submitted telephone logs reflecting 822 calls made from two telephone numbers assigned to Respondent Tanenblatt between January 13, 2003 and July 31, 2003. Complainant contends that 347 calls were not related to state business, and specifically identified thirty seven (37) calls made to the White House Office of Political Affairs and thirty three (33) calls as being to a variety of Republican or Republican affiliated organizations or individuals. The Complainant included exhibits consisting of Respondent Tanenblatt's daily calendar for January 2003 through July 2003, articles or announcements from a variety of websites, and other publications, in addition to the telephone logs. Complainant alleges that these fundraising activities result in an in-kind contribution from the Governor of Georgia, the State of Georgia, or Respondent Tanenblatt as defined in 2 U.S.C. § 431(8)(A)(ii). Respondent Tanenblatt reimbursed the State of Georgia for a portion of the calls which he told the State of Georgia were personal. As Respondent Tanenblatt had previously contributed the maximum allowed under the FECA to Bush-Cheney '04, Inc., Complainant contends any in-kind contribution from him would result in an excessive contribution.

Violations Alleged: 2 U.S.C. §§ 441a, 441a(f), 11 C.F.R. §§ 100.54, 110.9

Respondents' Replies: Respondent Tanenblatt contends that his calls were not fundraising calls. He maintains that even if the amount he reimbursed to the state of Georgia was considered an in-kind contribution, it would have been *de minimis* at less than \$100. However, Bush-Cheney '04, Inc. refunded Respondent Tanenblatt's original contribution to Bush-Cheney '04, Inc.

Respondents Bush-Cheney '04, Inc. and David Herndon contend that while Respondent Tanenblatt was a fundraising agent for Bush-Cheney '04, Inc., there was no evidence that his actions violated any aspect of the FECA. Any fundraising activities by Respondent Tanenblatt were done on his own time, resulting in no in-kind contribution to the committee. In an abundance of caution, however, Respondents Bush-Cheney '04, Inc. and David Herndon stated that the committee refunded Respondent Tanenblatt's contribution of \$2,000. Respondents Bush-Cheney '04, Inc. and David Herndon contend that as Respondent Tanenblatt explained to the State of Georgia, the calls he reimbursed the State for were personal, he made no in-kind contribution to Bush-Cheney '04, Inc.

Respondent Office of the Governor of the State of Georgia contends that Complainant cannot properly name the Office of the Governor of the State of Georgia because states and their agencies cannot be made respondent parties to complaints made to federal agencies by private parties. *Federal Maritime Commission v. South Caroline State Ports. Auth.*, 535 U.S. 743 (2002). This Respondent further contends that it was not paying Respondent Tanenblatt to render services to a political committee. The allegations raised against Respondent Tanenblatt, if true, would be outside the scope of his employment, and not that as defined in 2 U.S.C. § 431(8)(A)(ii). Therefore, Respondent Office of the Governor of the State of Georgia requests, for the reasons stated, that no action be taken against the Office of the Governor of the State of Georgia.

Respondent State of Georgia contends Complainant cannot properly name the State of Georgia because states . . . cannot be made respondent parties to complaints made to federal agencies by private parties. *Federal Maritime Commission v. South Caroline State Ports. Auth.*, 535 U.S. 743 (2002). This Respondent further contends that it was not paying Respondent Tanenblatt to render services to a political committee. Respondent State of Georgia stated that "[t]he 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)." Therefore, Respondent State of Georgia requests, for the reasons stated, that no action be taken against the State of Georgia.

Issues:

Excessive contributions 2 U.S.C. § 441a, 11 C.F.R. § 100.54

Acceptance of prohibited contributions 2 U.S.C. § 441a(f), 11 C.F.R. § 110.9

Related FEC Experience/Guidance: While there are many matters involving excessive contributions, including in-kind contributions, and the acceptance of prohibited contributions by a committee, there seem to be few involving a contribution resulting from the payment of compensation for the personal services of another person which were rendered to a political committee without charge. In other matters involving excessive contributions, the resolutions ranged from closing the file with no further action to a civil penalty.

Analysis: The statute and regulations are clear on the definition of a contribution, as well as the limits an individual can contribute and a committee can accept under the FECA.

The Complainant filed a large amount of documentation in support of his allegation that Respondent Tanenblatt was fundraising for Bush-Cheney '04, Inc. while being paid as the Chief of Staff for the Governor of the State of Georgia. While the telephone logs and daily calendars reflect communications between Respondent Tanenblatt and the individuals or organizations alleged by Complainant, there is no evidence of what the communications consisted of

ADR Recommendation: DISMISS