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October 15, 2004

**CERTIFIED MAIL 7003 1010 0002 0916 1366**

Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination and  
Legal Administration  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

2004 OCT 20 P 2:56

Re: Mayor Philip L. Capitano  
MUR 5531

Dear Mr. Jordan:

Please let this letter serve as acknowledgment of receipt of your letter dated September 20, 2004 received September 27, 2004 addressed to Mayor Philip L. Capitano. Enclosed herewith is the "Statement of Designation of Counsel" which has been duly executed by Philip L. Capitano.

Please let this letter serve as our response and request that no action should be taken against Philip L. Capitano in this matter based on the factual and legal materials submitted herewith which we submit are relevant to the Commission's analysis of this matter.

**BACKGROUND INFORMATION:**

This letter will serve to initially point out that the election referred to herein was an extremely acrimonious local election for the position of Mayor of the City of Kenner, State of Louisiana, wherein Philip L. Capitano defeated the complainant, Police Chief Nick Congemi.

In the years preceding the election in question, the complainant's brother, Louis Congemi held the post of Mayor of the City of Kenner until he was elected to the Jefferson Parish Council. Prior to the election, it was widely speculated that Police Chief Nick Congemi would easily win the special election called to succeed his brother. When the acting Mayor set the date of the special election, a lawsuit was immediately filed by Chief Congemi to move up the race so that any competition would be ill prepared to face him and his well-settled political machine. That lawsuit was the first proceeding of many which Chief Congemi has instituted to thwart and obstruct Mayor Capitano and his administration.

When the City Council of the City of Kenner and the Mayor's office proposed action to curb the previously unchecked spending of the Police Department, Chief Congemi announced that he would close the city jail, despite ordinances that require him under his duties as jailer to operate the jail. At his direction, approximately 100 of his employees have sued the Mayor for overtime pay. In another political move, Chief Congemi announced that his officers would no longer cite people for city offenses, opting to charge them under Louisiana state law, thereby depriving the City of Kenner of millions of dollars in revenue. In short, the current proceeding is just another in a long list of baseless accusations that Chief Congemi has devised in order to frustrate Mayor Capitano.

Fortunately, as a result of these accusations, the Chief and the Mayor have met and have now reached some common ground wherein it is hopeful that they can iron out their differences without the necessity of filing frivolous and expensive litigation.

As we are sure that you are aware, Chief Congemi has already asked that the Complaint which he has filed in the instant proceeding be dismissed. A copy of that request is attached hereto as Exhibit "A."

#### **PROCEDURAL OBJECTIONS:**

2 U.S.C. Section 437(g) states, in pertinent part that,

"Any person who believes a violation of this Act or of Chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and **shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18.**" (Emphasis added).

The complaint which was filed in this matter is fatally defective in that it was **not** made "under penalty of perjury and subject to the provisions of Section 1001 of Title 18". Due to the fact that the requirement that all allegations of the complaint be made subject to the penalty of perjury has not been met, a procedural deficiency exists which should invalidate the complaint.

Furthermore, the Complaint is very vague and does not make any specific allegations of fact or specific charges to which we can adequately respond.

#### **FACTUAL AND LEGAL OBJECTIONS:**

In looking at the submission made to the Commission, we submit that it is obvious and apparent that Philip L. Capitano is not endorsing the election of **both** George Bush and John Kerry. Both of the political advertisements in question were issued for the sole purpose of supporting Philip L. Capitano for the office of Mayor of the City of Kenner. The sole purpose of the Philip L. Capitano Campaign Committee was to elect Philip L. Capitano as Mayor of the City of Kenner.

In fact, at the time of the election of mayor, neither George Bush nor John Kerry had any significant opposition to their positions as their party's nominee. The other Republican mentioned

on the brochure is David Vitter who was not, at the time, running for any office and was not even on the ballot.

On the brochure and sample ballot in question, there are absolutely no endorsements either for or against the presidential candidates. In fact as you can see both candidates were mentioned. On the brochure containing a photo of George W. Bush, the text states that Phil L. Capitano is "reason #3" to vote for endorsed Republican leaders. A letter from the Republican Party Leadership is attached which does not mention any candidate except Phil L. Capitano.

On the sample ballot containing a photo of John Kerry, the sample ballot in question is an endorsement by Councilman Marc Johnson and Councilwoman Wilma Landry of Phil L. Capitano for Mayor of the City of Kenner. Again, there is absolutely no inference that Phil L. Capitano is supporting or endorsing John Kerry in any manner. On the contrary, the clear intention is that the council persons listed believe that Phil L. Capitano is "for you" as the text of the sample ballot plainly states.

To be governed by the provisions of the Federal Election Campaign Act, the speech or language used when read as a whole and with limited reference to external events, be susceptible to no other reasonable interpretation than as exhortation to vote for or against a specific candidate; speech is express for that purpose if its message is unmistakable, unambiguous, and suggestive of only one plausible meaning even if not presented in clearest, most explicit language, speech is "advocacy" if it presents clear plea for action rather than being merely informative, and speech must clearly encourage a vote for or against a candidate rather than some other kind of action. *Federal Election Comm v. Firgath* C.A.9 Cal 1987, 807 F.2d 857 cert. denied 108 S. Ct. 151

When reading these materials as a whole the opposite conclusion is the only one which can reasonably be reached. The only reasonable interpretation is that these materials are exhorting the voters to vote for the candidate in the local election for the office of Mayor, **Phil L. Capitano**. These materials are not advocating the election of both of the federal candidates in the primary who in fact did not have any opposition.

These mailings were made by "the Republican Party Leadership" and by "Councilmen Marc Johnson and Councilwoman Wilma Landry." The only way Philip L. Capitano is connected with these pieces is that his campaign for mayor underwrote their cost. The fact that they were paid for by Philip L. Capitano is clearly reflected upon the brochure and upon the Sample Ballot. These payments were properly reported on the campaign finance report filed by the Committee to Elect Philip L. Capitano. The complete finance report is available on-line at the Secretary of State for the State of Louisiana.

As you are aware, the purpose of the Federal Election Campaign Act is to limit spending in federal election campaigns and to eliminate actual or perceived pernicious influence over candidates for elective office that wealthy individuals or corporations could achieve by financing the political war chests of those candidates. *Orloski Vs. Federal Election Committee* 795 F.2d 156 U.S. App D.C. 111. The spending in the instant matter was only of several hundred dollars which was directed toward the election of Philip L. Capitano in the local election for the office of Mayor. This brochure

and sample ballot do not fit within the ambit of the purpose of the Federal Election Campaign Act.

We further submit that the payment of the cost of the brochure and the sample ballot is not an "expenditure" as defined in 2 U.S.C.A. section 431(9)(A) due to the fact that it was not a payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office.

If there were any doubt that this cost was not an "expenditure" this doubt would seem to be removed by 2 U.S.C.A. section 431(9)(B)(iv) which provides in relevant part as follows:

"the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed sale card or sample ballot, or other printed listing, of three or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising;"

This position is supported by the language of Federal Election Commission Advisory Opinion 1984-62.

In the event that these costs were in fact "expenditures," the "expenditures" were diminimus. The cost was only several hundred dollars. That portion of the hundreds of dollars spent which could possibly be allocated to the federal candidates is minimal. This is especially the case since neither federal candidate had any opposition. Thus, the costs not to mention the total "expenditures" in their aggregate did not exceed \$1,000 during the calender year. Accordingly, the Philip L. Capitano Campaign is not a "political committee" as defined by 2U.S.C.A. Section 431 (4)(A).

Lastly we submit that even if the costs incurred were "expenditures" then they are not "independent expenditures" as defined by 2 U.S.C.A. section 431(17)(A), due to the fact that the communication for which they were incurred does not expressly advocate the election or defeat of a clearly identified candidate for the Presidency.

Even if the costs incurred were to be determined in part to be "independent expenditures" as so defined, we submit that the Phil L. Capitano campaign was not required to file a statement under 2 U.S.C.A. section 434(c)(1) due to the fact that the aggregate amount or value attributable to the federal campaign was not in excess of \$250.00 during a calendar year for either candidate.

We have enclosed an affidavit in support of this Opposition.

In summary, the complaint alleged in the present matter is both procedurally and factually flawed. It begins by lacking sworn statements of fact made under penalty of perjury and then fails to demonstrate facts which would constitute a violation of federal election law. This was a local election for the office of Mayor of the City of Kenner. This complaint is simply another attempt by

24-19-023-4923

Chief Congemi to taunt and pester Mayor Capitano by requiring him to defend himself against baseless allegations. We submit that this matter is outside the scope of your jurisdiction and that there are no violations of federal law.

A thorough review of the applicable statutes is very difficult. We are sure that you may have additional reasons why this Complaint should be dismissed which our cursory review of the applicable law has not uncovered. We would appreciate your comments.

We shall be pleased to answer any additional questions that you may have concerning this matter.

Very truly yours,



Michael G. Gaffney

MGG/dcg  
Enclosures

cc: Mayor Philip L. Capitano

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AFFIDAVIT

STATE OF LOUISIANA

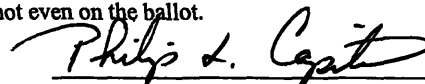
PARISH OF ORLEANS

**BEFORE ME**, the undersigned Notary Public, personally came and appeared

**PHILIP L. CAPITANO**, a resident of the Parish of Jefferson,  
State of Louisiana, of the full age of majority,

who, being duly sworn, deposed and said under penalty of perjury, that:

1. The Capitano campaign committee was not pushing for the election of **both** George Bush and John Kerry
2. Both of the political advertisements in question were issued for the sole purpose of supporting Philip L. Capitano for the office of Mayor of the City of Kenner.
3. The sole purpose of the Philip Capitano Campaign Committee was to elect Philip L. Capitano as Mayor of the City of Kenner.
4. That the advertisements which were used during the mayoral election were not to endorse or oppose either George Bush or John Kerry for President
5. That all of the advertisements in question were for the sole purpose of supporting Philip L. Capitano for Mayor and were not intended to endorse or oppose the Presidential candidates.
6. The only way my campaign for Mayor is connected with either of the advertisements in question is that my campaign paid for them and such payment is reflected on the campaign finance report.
7. At the time of the election of mayor, neither George Bush nor John Kerry had any significant opposition to their positions as their party's nominee.
8. The other Republican mentioned on the brochure is David Vitter who was not running for any office and was not even on the ballot.

  
PHILIP L. CAPITANO

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