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Washington, D.C. 20463

JUN 20 2002

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5127
DATE COMPLAINT FILED: October 23, 2000
DATE OF NOTIFICATION: November 1, 2000
DATE ACTIVATED: December 7, 2001

EARLIEST EXPIRATION OF
STATUTE OF
LIMITATIONS: October 25, 2002

COMPLAINANT: Bradley D. Goodrich, Executive Director, Republican
Party of Illinois

RESPONDENTS: Democratic Party of Illinois and
Michael J. Kaspar, as treasurer
State of Illinois

**RELEVANT STATUTES AND
REGULATIONS:** 2 U.S.C. § 431(11)
2 U.S.C. § 441a(a)(1)(C)
2 U.S.C. § 441a(f)
11 C.F.R. § 100.7(a)(3)(iii)
11 C.F.R. § 100.7(b)(3)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

1 **I. GENERATION OF MATTER**

2 Bradley Goodrich, the Executive Director of the Republican Party of Illinois,
3 complained to the Federal Election Commission ("Commission") that the State of Illinois
4 has made an excessive contribution to the Democratic Party of Illinois ("DPT") in
5 violation of the Federal Election Campaign Act of 1971, as amended ("the Act").
6 Specifically, Mr. Goodrich alleged that Timothy Mapes received a state salary for serving

as the Chief of Staff to the Speaker of the Illinois House, Michael J. Madigan, while Mr. Mapes was serving full-time as the Executive Director of DPI.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

Respondent DPI is registered with the Commission as the Democratic state party committee in Illinois and has federal and nonfederal accounts. It is undisputed that Timothy Mapes is the Executive Director of DPI and that he is also the Chief of Staff to the Speaker of the Illinois House, Michael J. Madigan. It is also undisputed that Mr. Mapes receives a state salary in the latter role.

Complainant alleged that Mr. Mapes' role as DPI's Executive Director is a full-time position. He based this allegation on the fact that DPI has raised millions of dollars in federal funds during Mr. Mapes' tenure as Executive Director, concluding that "the Democratic Party cannot credible [*sic*] argue that it has done this without a full time Executive Director." Complaint, p. 1, n. 1. Complainant further alleged that, since 1998, DPI has made only one "payroll check" payment to Mr. Mapes, for \$2,773.36 in October 1998. (DPI's 1998 Post-General Report discloses this payment to Mr. Mapes.) Thus, Complainant concluded "the State of Illinois is paying for Mr. Mapes to be the Democratic Party of Illinois Executive Director."

Having alleged that the State has made excessive contributions to DPI, Complainant estimated the amount of the contribution as follows: "Assuming a biweekly salary of \$2,773.36 as shown on that one report, this means the State is contributing at least \$72,000 to the Democratic Party of Illinois each year." Complaint, p. 2. The

1 complaint did not address the issue of characterizing this alleged contribution as federal
2 or nonfederal.

3 On November 30, 2000, Complainant wrote to the Commission requesting to
4 withdraw the complaint. The withdrawal request did not add any new facts; rather,
5 Complainant referred to "this time of uncertainty," and indicated he does not wish "to add
6 to this difficult political climate." Letter of Bradley D. Goodrich, November 30, 2000.
7 Consistent with the Commission's practice, this Office informed Complainant that his
8 withdrawal request will not prevent the Commission from taking appropriate action under
9 the Act.

10 Respondent State of Illinois, by its Attorney General, made a three-part response
11 to the complaint. First, the Attorney General's Office stated that it "lacks knowledge of
12 facts sufficient to form a belief as to the truth or falsity of the allegations of the
13 complaint." Letter of Sarah L. Pratt, Assistant Attorney General, November 21, 2000, p.
14 1. Second, they argued that the State is not a "person" under the Act, and thus is not
15 subject to the contribution limitations allegedly violated. *Id.*, pp. 1-2. Finally, if a
16 violation of the Act is found, the Attorney General's Office requests reimbursement to the
17 State by DPI. *Id.*, p. 2.

18 DPI and its treasurer began their response by pointing out "[t]here are at least two
19 ways that Mr. Mapes can act as DPI's Executive Director without compensation from
20 DPI. First, Mr. Mapes could volunteer his services during non-employment time.
21 Second, Mr. Mapes could, even during employment time, use bona fide vacation or other
22 earned leave time." Letter of Michael J. Kaspar ("DPI response"), pp. 2-3. After making
23 this statement, however, DPI never directly claimed that Mapes provided volunteer

1 personal services to DPI or that he used vacation or leave time to work for DPI, although
2 the response is obviously crafted to imply such defenses.

3 The response expressly cited 11 C.F.R. § 100.7(b)(3) and relevant Advisory
4 Opinions about volunteer personal services, and then stated, "Here, the Complaint does
5 not allege, much less prove, that Mr. Mapes did not volunteer his time to DPI." DPI
6 response, p. 3. Similarly, DPI cited 11 C.F.R. § 100.7(a)(3)(iii) and relevant Advisory
7 Opinions about use of leave time, etc. for political activities, and then wrote, "Once
8 again, the Complaint does not allege that Mr. Mapes is not using bona fide vacation or
9 other leave time while acting as DPI's Executive Director." *Id.*

10 DPI also argued that the State could not make a contribution because it is not a
11 "person" under the Act. DPI also argues that the Commission should decline to act on
12 the complaint because it is "politically motivated" and because several years have passed
13 since the underlying events occurred. DPI response, p. 5.

14 **B. Law**

15 The Act defines "contribution" to include either (1) "any gift, subscription, loan,
16 advance, or deposit of money or anything of value made by any person for the purpose of
17 influencing any election for federal office" or (2) "the payment by any person of
18 compensation for the personal services of another person which are rendered to a political
19 committee without charge for any purpose." 2 U.S.C. § 431(8)(A). The term "anything
20 of value" includes all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A). Examples of
21 in-kind contributions include use of facilities, supplies, and personnel. *Id.* Contributions
22 to political committees must be reported in accordance with the Act. 2 U.S.C. § 434(b).

23 The Act and the regulations contain exceptions to the definition of contribution.

1 First, individual volunteer activity does not qualify as a contribution. 2 U.S.C.
2 § 431(8)(B)(i). Second, with regard to paying for the personal services of another who
3 performs services to a committee, no contribution results if an hourly or salaried
4 employee makes up the time spent working on political activity within a reasonable
5 amount of time. 11 C.F.R. § 100.7(a)(3)(i). Similarly, no contribution results if the
6 employee is paid on a commission or piecework basis or if the employee uses vacation
7 time to render services to a committee. 11 C.F.R. § 100.7(a)(3)(ii) and (iii).

8 The Act also provides that no person shall make contributions to any political
9 committee (other than a national political party committee) with respect to any election
10 for federal office that, in the aggregate, exceed \$5,000. 2 U.S.C. § 441a(a)(1)(C).
11 "Person" is defined as "an individual, partnership, committee, association, corporation,
12 labor organization, or any other organization or group of persons, but such term does not
13 include the Federal Government or any authority of the Federal Government." 2 U.S.C.
14 § 431(11). Political committees are prohibited from knowingly accepting any
15 contributions in excess of the Act's limitations. 2 U.S.C. § 441a(f); 11 C.F.R. § 110.9(a).

16 **C. Analysis**

17 *1. Applicability of the Act to States*

18 As a threshold matter, this Office must address the respondents' contention that
19 the Act's contribution limits do not apply to states. If Illinois is not a "person" subject to
20 the Act's limits, it could potentially provide unlimited in-kind contributions to DPI. The
21 Commission, however, has previously made clear that states are "persons" and are thus
22 subject to contribution limits.

23 The Commission's treatment of states as "persons" began after the Act was

1 amended in 1979 to exclude the federal government from the definition of "person."¹
2 Because Congress took specific action to preclude the federal government but not States
3 from making a contribution, the Commission was given implicit authority to hold States
4 liable under the Act's contribution limits.² For example, in MUR 1686, the Commission
5 found reason to believe that North Carolina made an excessive, in-kind contribution to
6 then-Governor Jim Hunt. Governor Hunt had traveled on state-owned helicopters during
7 his Senate campaign. The Commission took no further action against North Carolina
8 after Hunt's committee fully reimbursed the state for use of the aircraft.³

9 Other enforcement matters also have noted the applicability of the Act to states.
10 In MUR 3986 (Wilder), which also involved a governor using state aircraft for federal -
11 campaign travel, the Commission found reason to believe that Virginia violated the Act's
12 contribution limits. Additionally, in MUR 5082 (Sherwood), the Commission found
13 reason to believe that a federal candidate's committees accepted an excessive contribution
14 where a state employee allegedly was ordered to work on a congressional campaign

¹ According to the legislative history, the amendments were adopted because misuse of federal funds is a violation of federal law subject to enforcement by other agencies. See H.R. Rep. No. 422, 96th Cong., 1st Sess. (1979), contained in *Legislative History of the Federal Election Campaign Act Amendments of 1979*, Federal Election Commission, (1983) at 190-191. Prior to the 1979 amendments, the Commission did not treat states as "persons." In MUR 246 (Jimmy Carter), for example, this Office wrote in a report to the Commission that "there appears to be no legislative history to support a finding that a sovereign state is a person within the meaning of the Act." Accordingly, the Commission found no reason to believe that the State of Georgia violated the Act by printing a book that featured then-Governor Carter.

² This interpretation is consistent with the traditional canon of statutory interpretation known as *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others). See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (accepting the maxim that when a statute limits something to be done in a particular mode, it includes a negative of any other mode); see also Norman Singer, *Statutes and Statutory Construction* § 41:23 (6th ed.) (available in the FEC library).

³ In MUR 2074 (Charles Schumer), however, decided the same year as *Hunt*, the Commission failed to find reason to believe that the State of New York violated the Act with respect to possible in-kind contributions provided by Schumer's state Assembly staff. Because this MUR was decided before the Commission began issuing statements of reasons, there is no indication of why the Commission voted to find no reason to believe the Act was violated in this matter.

1 during her normal working hours.⁴ Most recently, in MUR 5135 (Bush), the Commission
2 unanimously adopted this Office's analysis that Texas was subject to the Act's
3 contribution limits in finding no reason to believe based on other grounds.

4 Advisory opinions also have applied the Act's contribution limits to states. For
5 example, in Advisory Opinion 1999-7, the Commission told Minnesota that a proposed
6 Internet site was permissible under the nonpartisan voter-drive exemption. The
7 Commission made this determination, though, after noting that states are not excluded
8 from the Act's definition of "person."⁵ Similarly, Advisory Opinion 2000-5, which dealt
9 with the applicability of the Act to Indian tribes, stated, "the Commission has made clear
10 that State governments and municipal corporations are persons under the Act and are
11 subject to its contribution provisions." Thus, the State of Illinois is a person capable of
12 making a contribution under the Act.⁶

⁴ Because of unresolved issues of who knew of the employee's activities, the Commission took no action against the Commonwealth of Pennsylvania in MUR 5082.

⁵ Indeed, the Commission would not have even needed to discuss the nonpartisan voter-drive exemption if the Act's contribution limits did not apply to states.

⁶ Illinois' response to the complaint references case law on Eleventh Amendment immunity. The Eleventh Amendment, however, protects states only from suits by individuals, not the federal government. *See Alden v. Maine*, 527 U.S. 706, 754 (1999) (stating that "the constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law"). Although the Supreme Court recently held that the Eleventh Amendment barred a federal agency from proceeding on a matter in which an individual filed a complaint against a state, that case involved the Federal Maritime Commission, whose proceedings are significantly different from those of the Commission. *See Federal Maritime Commission v. South Carolina State Ports Authority*, No. 01-46, 2002 U.S. Lexis 3794 (May 28, 2002). Unlike the Federal Maritime Commission, which adjudicates disputes between parties using administrative law judges, the Federal Election Commission independently investigates matters, without involving the complainant in the enforcement process. Indeed, the Supreme Court stated that "private parties remain perfectly free to complain to the Federal Government about unlawful State activity and the Federal Government remains free to take subsequent action. The only step the FMC may not take . . . is to adjudicate a dispute between a private party and a nonconsenting State." *Id.* at *45, n. 19 (internal quotations omitted).

1 **2. *Alleged In-Kind Contributions***

2 Because Illinois is a "person" subject to the Act's contribution limits, the next
3 issue is whether DPI received an excessive, in-kind contribution resulting from Mr.
4 Mapes' activities. DPI's response to this allegation is awkward and ambiguous in that
5 DPI never unequivocally claims that Mr. Mapes volunteered his personal services on his
6 off-duty hours or that he used *bona fide* personal leave to work for DPI during normal
7 business hours. DPI's citations to the relevant Commission regulations (i.e., 11 C.F.R.
8 § 100.7(b)(3) and 11 C.F.R. § 100.7(a)(3)(iii)) indicate that it understands the law, but it
9 never affirmatively claims the exemptions applied to Mr. Mapes' particular conduct.

10 The response argued about what the complaint does not allege, while making few
11 relevant, positive assertions. For example, in the concluding paragraph of this part of its
12 argument, DPI wrote:

13 Nothing in this Complaint distinguishes Mr. Mapes from the tens of
14 thousands, if not millions, of Americans who volunteer their time and
15 energy for political candidates and parties each year. If a Complaint as
16 deficient as this is permitted to stand, then every employed person who
17 volunteers on behalf of a political candidate risks being called to defend
18 themselves from frivolous, unsubstantiated claims like this one. It is
19 difficult to imagine a scenario that would deter political volunteerism
20 more. DPI response, p. 4.

21 However, nowhere in this concluding paragraph did DPI explicitly state that Mr. Mapes
22 was such a volunteer.

23 DPI's response is also conspicuously devoid of statements from Mr. Mapes
24 himself. As DPI's Executive Director, he is presumably available to DPI. Yet DPI
25 provides no affirmative statement from Mr. Mapes swearing that he never performed
26 activities for DPI during his normal working hours for the Speaker. Mr. Mapes' silence
27 evidences a critical factual void that requires further investigation.

1 If an investigation shows that Mr. Mapes did indeed perform activities for DPI
2 during his normal working hours for the State, then Illinois would have made a
3 contribution to DPI by virtue of paying Mr. Mapes' salary. *See* 2 U.S.C. § 431(8)(A)(ii).
4 Further, if the value of Mr. Mapes' services exceeded \$5,000, then Illinois would have
5 violated the Act's contribution limits. *See* 2 U.S.C. § 441a(a)(1)(C). Finally, this Office
6 notes that DPI has not reported receiving any contributions from Illinois. *See* 2 U.S.C.
7 § 434(b). Therefore, this Office recommends that the Commission find reason to believe
8 that the State of Illinois violated 2 U.S.C. § 441a(a)(1)(C) and that the Democratic Party
9 of Illinois and Michael J. Kaspar, as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b).

10 **III. PROPOSED DISCOVERY**

21 **IV. RECOMMENDATIONS**

- 22 1. Find reason to believe that the State of Illinois violated 2 U.S.C. § 441a(a)(1)(C);
23 2. Find reason to believe that the Democratic Party of Illinois and Michael J. Kaspar,

- 1 as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b);
- 2 3. Approve the attached subpoenas and orders for Timothy Mapes and the
- 3 Democratic Party of Illinois;
- 4 4. Approve the attached factual and legal analyses; and
- 5 5. Approve the appropriate letters.
- 6
- 7
- 8
- 9

Lawrence H. Norton
General Counsel

6/20/02

Date

BY:



Rhonda J. Vosdinger

Associate General Counsel for Enforcement



Mark D. Shonkwiler

Acting Assistant General Counsel



Brant S. Levine

Attorney

Other Staff Assigned:
John Vergelli