

AUG 28 2008

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

11044290032

1	MUR:	5982
2	DATE COMPLAINT FILED:	March 17, 2008
3	DATE OF NOTIFICATION:	April 15, 2008
4	DATE OF LAST RESPONSE:	May 15, 2008
5	DATE ACTIVATED:	May 30, 2008
6		
7		
8	EXPIRATION OF STATUTE	May 2012
9	OF LIMITATIONS:	
10	COMPLAINANT:	Jan Schneider
11		Friends of Jan Schneider
12		
13	RESPONDENTS:	Christine Jennings
14		Chris Jennings for Congress and Susan K. Flynn,
15		in her official capacity as Treasurer
16		Christine Jennings for Congress and Susan K. Flynn,
17		in her official capacity as Treasurer
18		Jennings 2008 and Ed Chiles, in his official
19		capacity as Treasurer
20		
21		
22	RELEVANT STATUTES AND	2 U.S.C. § 431
23	REGULATIONS:	2 U.S.C. § 441a(a)(1)
24		2 U.S.C. § 441a(f)
25		11 C.F.R. § 111.4
26		11 C.F.R. § 113
27		11 C.F.R. § 116
28		
29	INTERNAL REPORTS	Disclosure Reports
30	CHECKED:	
31		
32	FEDERAL AGENCIES	Internal Revenue Service
33	CHECKED:	

I. INTRODUCTION

The Complaint alleges that during Christine Jennings' successive campaigns for the Florida 13th Congressional District seat, Chris Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer ("2004 Committee"), Christine Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer ("2006 Committee"), and Jennings 2008 and Ed Chiles, in his official capacity as Treasurer ("2008 Committee"), (collectively the "Committees"), violated the Federal Election Campaign Act of 1971, as amended ("the Act" and "FECA") by failing to make timely submissions of taxes withheld from campaign employees to federal and state taxing authorities, and using these monies to pay for campaign expenses. Complaint at 1-2.

The 2004 Committee reported a debts of \$23,835 to the Internal Revenue Service and Florida Revenue Department in its 2006 Year End Report, and reported full payment of the debt in 2007. The 2006 Committee did not disclose any debt relating to overdue tax payments, and while not reporting any disbursements to tax authorities in 2006, reported disbursements of approximately \$30,213 in payroll taxes in early 2007. The 2008 Committee did not disclose any debt relating to overdue tax payments, and reported disbursements of approximately \$22,289 in payroll taxes in its 2007 Quarterly reports.

The Complaint suggests that the Committees' alleged failure to make timely submissions of tax withholdings amounted to "taking the money from [campaign] employees" and "illegally" using these funds for campaign purposes. *Id.* at 2. The Complaint claims that these "misappropriated" funds should be deemed "contributions" for purposes of the Act, *see* 2 U.S.C. § 431(8), and should be subject to the contribution limits set forth in 2 U.S.C. § 441a(a)(1). Complaint at 2.

Without addressing the factual circumstances surrounding the payment of payroll taxes, Respondents argue that the Complaint is without merit and should be dismissed.¹ Respondents contend that the question of whether the Committees properly filed and paid payroll taxes due to the Internal Revenue Service and state tax authorities in a timely manner is a matter for the Internal Revenue Service and state authorities to consider. They contend that the issue is beyond the Commission's jurisdiction and should be dismissed.

Although not directly addressed by either the Complaint or the Response, the facts of the matter also raise questions as to whether some of the Committees failed to report debt to federal and state taxing authorities.

Based on our review of the Complaint, the Response and publicly available information, we recommend that the Commission dismiss the Complaint as to Christine Jennings, Chris Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer, Christine Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer, and Jennings 2008 and Ed Chiles, in his official capacity as Treasurer.

II. ANALYSIS

A. The Committees' Non-Payment of Payroll Taxes

The issue of whether the Committees' payroll taxes were paid in a timely manner, or whether those funds should be considered to have been misappropriated, if used for other purposes, is beyond the scope of the FECA and the jurisdiction of the Commission. The FECA provides that the Commission shall administer and seek to obtain compliance with the Act, and shall have exclusive jurisdiction with respect to the civil enforcement of its provisions. See

¹ Jennings 2008 and Ed Chiles, in his official capacity as Treasurer, were named as respondents and notified by the Commission, but have filed no Response to the Complaint.

1 2 U.S.C. § 437c(b)(1). The Commission may only issue "reason to believe" findings if a
2 complaint sets forth sufficient specific facts that, if proven to be true, would constitute a
3 violation of the FECA. 11 C.F.R. § 111.4(d).

4 The Complaint argues that the payroll taxes withheld by the Committees should be
5 deemed "contributions" by the employee because they were owed to the state and federal
6 governments, but not paid to the proper authorities in a timely manner. Thus, it is suggested that
7 the withheld monies were essentially the property of the employees until the time the
8 Committees paid them to the tax authorities, and that what could be characterized as an
9 involuntary contribution resulted during the period the Committees held the employees' property
10 without making the required payments to the tax authorities. The Complaint further contends
11 that these "contributions" by individual employees exceeded the permissible contribution amount
12 and that the Committees knowingly accepted these excessive contributions from paid campaign
13 employees, in violation of 2 U.S.C. § 441a(a) and (f).²

14 The Act provides that no person shall make contributions to a candidate for federal office
15 or his authorized political committee, which exceeds contribution limits set forth in 2 U.S.C.
16 § 441a(a)(1). Additionally, the Act provides that no political committee shall knowingly accept
17 a contribution made for the benefit or use of a candidate, in violation of the contribution
18 limitations imposed in Section 441a(a). See 2 U.S.C. § 441a(f). Finally, the FECA inquires

² It is worth noting that we have no information from the Complaint or public record concerning how much in payroll taxes was allegedly withheld by the Committees for each specific pay period, as the Internal Revenue Service keeps confidential information concerning the amounts and nature of unpaid taxes and penalties. We only have information about the total amounts paid to the Internal Revenue Service for taxes, including overdue and current payroll taxes and possible late fees or penalties, based on what the Committee disclosed it paid to the state and federal revenue services directly or to the vendor it hired to process its payroll after it discovered it was in violation of the Internal Revenue Code.

1 authorized candidate committees to file timely and accurate disclosures, detailing all
2 contributions, expenditures and debts to the committees. 2 U.S.C. § 434(b).

3 As an initial matter, it certainly is not clear that the withheld payroll taxes, which the
4 employer Committees was required to withhold and submit to the taxing authorities, remain the
5 property of the employees. To the degree the taxes are owed to tax authorities, neither the
6 employees nor the Committees have unfettered rights as to use of these funds. Thus it may be
7 impossible to ascribe the alleged contributions to particular individuals.³ As discussed below, it
8 would be more appropriate to regard the funds as a debt due to the taxing authorities.

9 The issue of what amount of payroll taxes were due for each paid staff member, at what
10 point did the unpaid payroll taxes become legally overdue and subject to penalty, and when and
11 how an employer might remedy the default, are matters under the jurisdiction of federal and state
12 tax authorities, and are outside the Commission's jurisdiction to adjudicate. Yet, these issues
13 have a direct bearing on what the Complaint is asking the Commission to do: declare the overdue
14 payroll taxes, which were paid with interest and penalties upon the realization as to the prior
15 nonpayment, to have been sufficiently overdue to constitute contributions to the Committees.

16 **B. Potential Reporting Violations**

17 It is within the Commission's jurisdiction to examine whether the Committees reported
18 receipts, disbursements and debts in accordance with applicable disclosure requirements. See 2
19 U.S.C. § 434(b). Notwithstanding the issue of payroll taxes, the Committees appear to have

³ There is a clear distinction between simply declaring the funds to be contributions because they were not paid out in a timely manner, as suggested here, and a circumstance where the employee took money from his paycheck and made a contribution to the Committee. In that instance, the funds would have been disbursed from the Committee's accounts to the employee and the employee would have established ownership and control over the funds before opting to donate the money back to the Committee. The funds would clearly be in the possession of the employee, and the evidence of his intent to "influenc[e] [the] election" would be manifest. See 2 U.S.C. § 431(8).

1 properly reported their receipts and disbursements and there are no allegations or indications to
2 the contrary. 2 U.S.C. § 434(b).

3 What remains to be resolved is the issue of whether the unpaid payroll taxes were
4 properly reported as debts pursuant to 2 U.S.C. § 434(b). It should be noted that the Complaint
5 does not explicitly allege reporting failures regarding the tax issue, and consequently, the
6 Committees' Response does not discuss the issue either. In addition, the Response does not
7 address the factual circumstances that led to the failure to pay payroll taxes. However, media
8 reports cited by the Complaint indicate that although the payroll taxes were properly withheld
9 from employees, the payroll taxes were not timely remitted to state and federal authorities during
10 some period of time. *Id.* According to media reports, upon discovery of the omission, Jennings
11 removed the 2004 Committee's Treasurer and contacted the authorities to ascertain the amount
12 of the debt owed and begin making restitution, including the payment of overdue taxes and
13 penalties. This raises the issue of whether the Committees properly reported their debts of
14 overdue taxes and payments to state and federal authorities.

15 A review of the disclosures indicates that the 2004 Committee first disclosed the overdue
16 payroll tax debt to the Internal Revenue Service in its 2006 Year End report, filed March 17,
17 2007, and subsequently reported the debt and payments to retire the debts owed to the state and
18 federal revenue agencies in its disclosure reports during the first half of 2007. Both the 2006
19 Committee and the 2008 Committee disclosed various payments to the state and federal
20 authorities for payroll taxes, but did not disclose any tax related debt.

21 The Act requires candidate committee to report the amount and nature of all outstanding
22 debts and obligations owed by the committee. *See* 2 U.S.C. § 434(b)(8). Here, the issue of when
23 the debt should have been reported is complicated by the fact that the determination of when the

1 payroll taxes became a "debt" owed to the revenue authorities is unclear. In any event, the debt
2 reporting issue was not explicitly alleged by the complainant, and we have no response from the
3 respondent addressing it.

4 The record reflects that the 2004 Committee disclosed a \$23,835 "debt" in their Year-End
5 Report for 2006 and Quarterly Reports for the first half of 2007 disclosed payments made to
6 state and federal authorities for the payroll taxes, including fines and penalties. Although the
7 2006 Committee and the 2008 Committee reported disbursements to the taxing authorities in
8 their 2007 Quarterly Reports, it is unclear what portion of such payments may have been
9 delinquent. Indeed, whether the Committees were obligated to report these debts differently
10 would require factual and legal determinations of, among other things, when the state and federal
11 revenue collecting agencies considered the debts "overdue" subject to penalty, as well as a
12 factual investigation of when taxes were withheld for each employee, and the legal "status" of
13 monies withheld but not yet paid to state and local authorities, some of which are issues beyond
14 the Commission's jurisdiction. Given the fact that the Complaint makes no allegations regarding
15 reporting violations, as well as the fact that the 2004 Committee disclosed its debts and resolved
16 the matter with the taxing authorities, and that it is unclear if the 2006 Committee and 2008
17 Committee were in fact delinquent with such payments, we recommend the Commission dismiss
18 this matter.

19 C. Conclusion

20 In sum, the Internal Revenue Service and state authorities maintain jurisdiction over the
21 appropriate filing and payment of payroll taxes. The Commission maintains authority over
22 enforcing the contribution limits and disclosure requirements of the FECA. There is no support
23 for findings that the Committees' violated the FECA by knowingly accepting excessive

contributions, as defined by the Act, from paid employees. See 2 U.S.C. §§ 441a(a) and (f). Additionally, though there might be grounds for pursuing potential reporting violations, pursuant to 2 U.S.C. § 434(b)(8), given the totality of the circumstances, including the remedial actions taken by the Committees, and the Commission's limited resources, we recommend the Commission exercise its prosecutorial discretion and dismiss this matter.

Accordingly, we recommend the Commission dismiss the Complaint as to Christine Jennings, Chris Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer, Christine Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer, and Jennings 2008 and Ed Chiles, in his official capacity as Treasurer.

III. RECOMMENDATIONS

1. Dismiss the Complaint as to Christine Jennings, Chris Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer, Christine Jennings for Congress and Susan K. Flynn, in her official capacity as Treasurer, and Jennings 2008 and Ed Chiles, in his official capacity as Treasurer;
2. Approve the attached Factual and Legal Analysis;
3. Approve the appropriate letters; and
4. Close the file.

Thomasenia P. Duncan
General Counsel

Date

8/28/2008

BY:

Ann Marie Terzaken
Ann Marie Terzaken
Associate General Counsel
for Enforcement

Mark D. Shankweiler
Mark D. Shankweiler
Assistant General Counsel

MUR 5982
First General Counsel's Report

1
2
3
4
5
6
7
8
9
10

Camilla Jackson Jones
Camilla Jackson Jones
Attorney

11044290040