

POWERS
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April 27, 2012

VIA HAND DELIVERY

Mr. Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

2012 APR 27 PM 1:42
OFFICE OF
COUNSEL

Re: **MUR 6552 – Ohio State Medical Association Response**

Dear Mr. Jordan:

We represent the Ohio State Medical Association ("OSMA") pursuant to the Designation of Counsel statement faxed on April 24, 2012, a copy of which is attached as Exhibit 1 for your convenience.

The purpose of this letter is to respond to your letter dated April 11, 2012 (but not received until April 16, 2012), accompanied by a Complaint filed by Mark R. Brown entitled "In the Matter of Ohio State Medical Association; Josh Mandel; and Sherrod Brown" (hereinafter the "Complaint"). Please note that although the Complaint is made against three named parties, this response is being submitted solely on behalf of OSMA.

OSMA is a 501(c)(6) tax-exempt membership organization that represents 15,000 physicians in Ohio. FEC regulations permit a nonprofit organization like OSMA to invite any candidate of its choice to make a campaign speech before its restricted class at a conference. 11 CFR § 114.3(c)(2). The Complaint does not contest that OSMA properly invited two of the candidates for the U.S. Senate seat in Ohio, Senator Brown and Mr. Mandel, to speak to its restricted class on March 24, 2012, during OSMA's Annual Meeting. Rather, the complaint contends that OSMA subsequently violated the Federal Campaign Act (the "Act") by posting a

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video of each candidate's conference speech on a public area of its website, rather than on a password-protected area that was limited to its restricted class. (See paragraphs 2, 3, 19 and 28 of the Complaint). Complainant alleges that the videos constitute "something of value" to the candidates, similar to the advice given in FEC Advisory Opinion 1996-11.

OSMA admits that it inadvertently violated the Act through the actions of its communications staff, who unwittingly posted on the public area of the OSMA website links to a video of the two candidate's speeches that contained some campaign content.¹ This occurred at the same time that OSMA staff posted a great deal of proper, non-political news about other educational aspects of the same conference. In other words, the links to the videos were posted as part of the normal, post-conference educational process. In-house counsel was not consulted about the specific posting in question. No conscious decision was made to post the videos to promote or endorse the campaign of either candidate. And, in fact, no endorsement was made with the posting of the videos.

At the same time, contrary to Complainant's contention, OSMA never made any attempt to mislead the public into thinking this was a formal debate. The candidates did not appear together, and OSMA never described the appearances as a debate.

Moreover, shortly after this violation was brought to OSMA's attention by the Complainant, OSMA took steps to rectify the good faith mistake. Those steps included: (1) removing the links to the videos from its website (on April 3, 2012), (2) educating its staff on FEC regulations to ensure that public posting of candidate speeches does not recur, and (3) hiring outside counsel (i.e., this law firm) to advise and assist OSMA in reviewing and updating its policies and procedures to avoid this kind of problem from recurring.

OSMA denies Complainant's allegations that OSMA "continuously" posted the candidate speech videos on its website and also denies that Complainant "continues to be injured" by the violation. As noted above, OSMA promptly took corrective action to remove the videos from its website. During the time the candidate videos were posted to the public portion of its website, those videos received only 19 "hits" (i.e., 19 views by visitors to the website). While OSMA does not know the identity of those website visitors, it is likely that most visitors would have been persons from the restricted class (i.e., OSMA members) who were unable to attend the conference but who had an interest in conference news. See Jason Koma Affidavit (attached as Exhibit 2). In any case, the violation was relatively brief and had at best a de minimis impact on the other candidates.

¹ While Mr. Mandel's speech was clearly campaign related, Senator Brown's video does not once mention his campaign and focused on national health care issues. However, given that he spoke following Mr. Mandel's speech, the fact that the speeches occurred during an election season, and the overall context, OSMA does not contest that both talks were campaign related. The videos themselves were actually posted to an external site; only links to the videos were posted on the OSMA website.

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While OSMA is not responding on behalf of either candidate in question, we would note that Complainant provides no evidence either from personal knowledge or otherwise to support his contention in paragraph 28 of the Complaint that Senator Brown or Mr. Mandel "knowingly" accepted something of value from OSMA. The posting of the videos was in no sense intended to be an in-kind contribution to the candidates and, as noted above, the low number of hits for the videos indicates that little if any value was actually conveyed.

Thus, OSMA's violation was unintentional and had a *de minimis* effect on other candidates and the public. It certainly was not knowing and willful. See 2 U.S.C. § 437g(a)(5)(B). A knowing and willful violation requires evidence of "defiance or knowing, conscious, and deliberate flaunting of the Act." AFL-CIO v. FEC, 628 F.2d 97, 101 (D.C. Cir. 1980), cert den., 449 U.S. 982 (1980). By contrast, this was a good faith mistake by OSMA staff that have since been trained and counseled regarding the requirements of the Act. In addition, OSMA is reviewing and updating its policies and procedures to ensure that this situation does not recur.

We look forward to further discussions with you. Should you require additional information, please contact me at (202) 872-6756 or rob.portman@ppsv.com.

Sincerely,



Robert M. Portman

Enclosures

cc: D. Brent Mulgrew, OSMA Executive Director
Nancy Gillette, OSMA General Counsel
D. Benson Tesdahl, Powers Pyles Sutter & Verville



FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FEDERAL ELECTION COMMISSION

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OFFICE OF GENERAL COUNSEL

STATEMENT OF DESIGNATION OF COUNSEL
Please use *one* form for each Respondent/Entity/Treasurer
FAX (202) 219-3923

MUR # 6552

NAME OF COUNSEL: Robert M. Portman

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

4/24/12 D: Brent Mulgrew - [Signature] Executive Director
Date Respondent/Agent - Signature Title (Treasurer/Candidate/Owner)

NAMED RESPONDENT: Ohio State Medical Association

MAILING ADDRESS: 3401 Mill Run Drive
(Please Print)

Hilliard, OH 43026

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Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

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