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B-214455, Oct 24, 1984

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B-214455, OCT 24, 1984

APPROPRIATIONS - AVAILABILITY - PUBLICITY AND PROPAGANDA - PENDING LEGISLATION DIGEST: IT IS NOT A VIOLATION OF FEDERAL ANTI-LOBBYING STATUTORY AND REGULATORY RESTRICTIONS FOR THE GOVERNOR OF SOUTH CAROLINA TO USE FEDERAL GRANT FUNDS FROM THE APPALACHIAN REGIONAL COMMISSION IN AN ATTEMPT TO INFLUENCE THE STATE LEGISLATURE, THROUGH THE USE OF RADIO AND TELEVISION SPOT ADVERTISEMENTS, TO PASS LEGISLATION INCREASING THE STATE'S SALE TAXES TO SUPPORT AN IMPROVED STATE EDUCATION PROGRAM. THE ANTI-LOBBYING RESTRICTIONS CONTAINED IN 18 U.S.C. SEC. 1913 AND THE ANNUAL TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATION ACT ONLY PROHIBIT THE USE OF FEDERAL FUNDS TO INFLUENCE LEGISLATION PENDING IN CONGRESS AND DO NOT PROHIBIT EXPENDITURES TO INFLUENCE LEGISLATION PENDING IN STATE AND LOCAL LEGISLATURES.

THE HONORABLE THOMAS F. HARTNETT HOUSE OF REPRESENTATIVES

DEAR MR. HARTNETT:

THIS IS IN RESPONSE TO YOUR FEBRUARY 10, 1984 LETTER, REQUESTING THIS OFFICE TO PROVIDE YOU WITH A LEGAL OPINION ON THE PROPRIETY OF EXPENDITURES OF FEDERAL GRANT FUNDS FOR RADIO AND TELEVISION ADVERTISEMENTS BY THE GOVERNOR OF SOUTH CAROLINA TO PROMOTE LEGISLATION FOR INCREASED STATE SALES AND USE TAXES IN AN EFFORT TO IMPROVE THE QUALITY OF THE STATE'S EDUCATIONAL SYSTEM. OUR REVIEW OF THE FACTUAL DATA SUPPLIED TO US CONCERNING THE EXPENDITURES OF FEDERAL GRANT FUNDS BY THE GOVERNOR HAD LED US TO CONCLUDE THAT THEY WERE MADE FOR AUTHORIZED PURPOSES AND THERE IS NO BASIS FOR A DETERMINATION THAT THESE EXPENDITURES WERE MADE IN VIOLATION OF APPLICABLE ANTI-LOBBYING OR OTHER STATUTORY RESTRICTIONS.

THE APPALACHIAN REGIONAL COMMISSION (ARC) AWARDED THE OFFICE OF THE GOVERNOR OF THE STATE OF SOUTH CAROLINA A RESEARCH AND TECHNICAL ASSISTANCE PROGRAM FEDERAL GRANT IN THE AMOUNT OF $147,886 FOR THE PERIOD OCTOBER 17, 1983, TO MARCH 30, 1984. THE PURPOSE OF THE GRANT WAS TO ASSIST THE GOVERNOR IN PREPARING AND CONDUCTING AN "EXCELLENCE IN EDUCATION" CAMPAIGN TO IMPROVE THE QUALITY OF PUBLIC EDUCATION AND THEREBY INCREASE EMPLOYMENT OPPORTUNITIES FOR THE YOUTH IN SOUTH CAROLINA IN GENERAL, AND THE APPALACHIAN REGION IN PARTICULAR. A CRITICAL FEATURE OF THE CAMPAIGN WAS THE ENACTMENT OF LEGISLATION TO RAISE THE STATE SALES AND USE TAXES BY ONE CENT AND DEDICATE THIS ADDITIONAL REVENUE FOR THE IMPROVEMENT OF THE PUBLIC SCHOOLS.

AMONG OTHER THINGS, GRANT FUNDS WERE EXPENDED FOR THE PRODUCTION OF 30- SECOND RADIO AND TELEVISION PRESENTATIONS DESIGNED TO GAIN SUPPORT FOR THE GOVERNOR'S EDUCATION CAMPAIGN INCLUDING THE TAX LEGISLATION. THE PRESENTATIONS WERE BROADCAST DURING THE PERIOD THAT THE SOUTH CAROLINA STATE LEGISLATURE WAS IN

SESSION. ALSO, FEDERAL FUNDS WERE USED TO PREPARE AND DISTRIBUTE A ONE PAGE FLYER TO THE PUBLIC TO HIGHLIGHT THE PLAN AN TO PRODUCE A SLIDE AND TAPE PRESENTATION FOR USE BY SPEAKERS RECRUITED BY THE CAMPAIGN TO PRESENT THE PACKAGE TO VARIOUS CIVIC GROUPS. FEDERAL FUNDS WERE ALSO USED TO TRANSPORT EDUCATORS TO VISIT PROGRESSIVE EDUCATIONAL PROGRAMS IN OTHER STATES AND TO PREPARE AND PUBLISH A NUMBER OF REPORTS CONCERNING THE PROGRAM.

A REVIEW OF THE APPALACHIAN REGIONAL DEVELOPMENT ACT OF 1965, AS AMENDED (40 U.S.C. APP. 101 ET SEQ.), INDICATES THAT THE COMMISSION HAS AUTHORITY TO MAKE GRANTS OF THE TYPE WE ARE CONSIDERING HERE. SEE 40 U.S.C. APP. SEC. 302(A)(3). THE ACT CONTEMPLATES THAT FEDERALLY SPONSORED STATE AND LOCAL PROGRAMS, DESIGNED TO ENHANCE THE ECONOMIC GROWTH AND DEVELOPMENT OF THE REGION, MAY REQUIRE A CAMPAIGN TO EDUCATE THE PUBLIC ON THE NEED FOR THE PROGRAM AND THE BENEFITS IT WILL BRING. THE ACT ALSO ENVISIONS THAT ADDITIONAL STATE AND LOCAL LEGISLATION OR ADMINISTRATIVE ACTION MAY BE REQUIRED BY A STATE OF LOCAL GOVERNMENT ENTITY IN ORDER TO ACHIEVE THE OBJECTIVES OF A FEDERALLY SPONSORED PROGRAM. SEE FOR EXAMPLE 40 U.S.C. APP. SEC. 102 AND 103. THE GOVERNOR APPARENTLY USED SOME OF THE ARC GRANT FUNDS TO INFORM THE PUBLIC ABOUT HIS PROPOSAL TO IMPROVE TO PUBLIC EDUCATION SYSTEM AND SOUGHT TO OBTAIN PUBLIC SUPPORT FOR LEGISLATION TO INCREASE TAXES REQUIRED TO FUND THE IMPROVEMENTS. THE USE OF GRANT FUNDS FOR THE PRODUCTION OF RADIO AND TELEVISION PRESENTATIONS OF THE GOVERNOR'S EDUCATION PROGRAM TO THE PUBLIC IN THE SIX COUNTY APPALACHIAN REGION OF SOUTH CAROLINA WAS SPECIFIED IN THE GRANT AGREEMENT BETWEEN THE COMMISSION AND THE STATE. FURTHER, THE COMMISSION HAS EXPRESSED THE OPINION THAT THE GRANT, INCLUDING THE RADIO AND TELEVISION PRESENTATIONS, "FURTHERS THE PURPOSES FOR WHICH THE COMMISSION WAS ESTABLISHED AND TRANSGRESSES NO FEDERAL LAWS." WE AGREE WITH THE COMMISSION THAT SUCH EXPENDITURES ARE PROPER AND PERMISSIBLE UNDER THE ACT SO LONG AS THEY DO NOT VIOLATE OTHER STATUTORY RESTRICTIONS ON THE USE OF SUCH FUNDS. AS DISCUSSED BELOW, WE HAVE CONCLUDED THAT THE EXPENDITURES DID NOT VIOLATE FEDERAL ANTI-LOBBYING LAWS.

FOR PURPOSES OF OUR ANALYSIS OF STATUTORY RESTRICTIONS ON LOBBYING ACTIVITIES, WE WILL ASSUME WITHOUT DECIDING THAT THE ABOVE DESCRIBED ACTIVITIES CONSTITUTED A GRASS ROOTS LOBBYING CAMPAIGN, WHEREBY FEDERAL GRANT FUNDS WERE USED IN AN EFFORT TO EXHORT MEMBERS OF THE PUBLIC TO CONTACT STATE LEGISLATORS AND URGE THEM TO SUPPORT LEGISLATION TO INCREASE THE STATE SALES AND USE TAXES. THERE ARE TWO STATUTORY PROVISIONS THAT ARE RELEVANT TO THIS ISSUE.

ONE FEDERAL ANTI-LOBBYING STATUTE IS CONTAINED IN 18 U.S.C. SEC. 1913, ENTITLED "LOBBYING WITH APPROPRIATED MONEYS" WHICH PROVIDES AS FOLLOWS:

"NO PART OF THE MONEY APPROPRIATED BY ANY ENACTMENT OF CONGRESS SHALL, IN THE ABSENCE OF EXPRESS AUTHORIZATION BY CONGRESS, BE USED DIRECTLY OR INDIRECTLY TO PAY FOR ANY PERSONAL SERVICE, ADVERTISEMENT, TELEGRAM, TELEPHONE, LETTER, PRINTED OR WRITTEN MATTER, OR OTHER DEVICE, INTENDED OR DESIGNED TO INFLUENCE IN ANY MANNER A MEMBER OF CONGRESS, TO FAVOR OR OPPOSE, BY VOTE OR OTHERWISE, ANY LEGISLATION OR APPROPRIATION BY CONGRESS, WHETHER BEFORE OR AFTER THE INTRODUCTION OF ANY BILL OR RESOLUTION PROPOSING SUCH LEGISLATION OR APPROPRIATION; BUT THIS SHALL NOT PREVENT OFFICERS OR EMPLOYEES OF THE UNITED STATES OR OF ITS DEPARTMENTS OR AGENCIES FROM COMMUNICATING TO MEMBERS OF CONGRESS ON THE REQUEST OF ANY MEMBER OR TO CONGRESS, THROUGH THE PROPER OFFICIAL CHANNELS, REQUEST FOR LEGISLATION OR APPROPRIATIONS WHICH THEY DEEM NECESSARY FOR THE EFFICIENT CONDUCT OF THE PUBLIC BUSINESS.

"WHOEVER, BEING AN OFFICER OR EMPLOYEE OF THE UNITED STATES OR OF ANY DEPARTMENT

OR AGENCY THEREOF, VIOLATES OR ATTEMPTS TO VIOLATE THIS SECTION, SHALL BE FINED NOT MORE THAN $500 OR IMPRISONED NOT MORE THAN ONE YEAR, OR BOTH; AND AFTER NOTICE AND HEARING BY THE SUPERIOR OFFICER VESTED WITH THE POWER OF REMOVING HIM, SHALL BE REMOVED FROM OFFICE OR EMPLOYMENT."

THERE HAS NEVER BEEN A PROSECUTION UNDER THIS STATUTE. IN ADDITION, ONLY A FEW CASES HAVE CITED THE STATUTE AND GENERALLY THEY HAVE NOT DEALT WITH THE MERITS OF A VIOLATION, BUT HAVE BEEN CONCERNED MOSTLY WITH PERIPHERAL ISSUES. SEE FOR EXAMPLE, NATIONAL ASSOCIATION FOR COMMUNITY DEVELOPMENT V. HODGSON, 356 F.SUPP. 1399 (D.D.C. 1973) WHERE THE COURT DENIED A MOTION TO DISMISS A CAUSE OF ACTION BROUGHT TO ENFORCE 18 U.S.C. SEC. 1913 AND AMERICAN PUBLIC GAS ASSOCIATION V. FEDERAL ENERGY ADMINISTRATION, 408 F.SUPP. 640 (D.D.C.1976) AND AMERICAN TRUCKING ASSOCIATION V. DEPARTMENT OF TRANSPORTATION, 492 F.SUPP. 566 (D.D.C. 1980) WHERE THE COURTS DENIED INJUNCTIONS AGAINST THESE AGENCIES DISTRIBUTING PUBLICATIONS FAVORING DEREGULATION OF THE INDUSTRIES REPRESENTED BY THE PLAINTIFF ASSOCIATIONS.

SINCE THE ABOVE STATUTE CONTAINS FINE AND IMPRISONMENT PROVISIONS, ITS ENFORCEMENT IS THE RESPONSIBILITY OF THE DEPARTMENT OF JUSTICE. IN A MAY 24, 1983 LETTER TO GAO, CONSTRUING THE STATUTE, THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, INDICATED THAT THE STATUTE APPLIED ONLY TO OFFICERS AND EMPLOYEES OF THE FEDERAL GOVERNMENT. HENCE, EXPENDITURES MADE BY OFFICIALS AND EMPLOYEES OF THE STATE OF SOUTH CAROLINA WOULD NOT COME WITHIN PREVIEW OF 18 U.S.C. SEC. 1913. MOREOVER, THE SOLE PURPOSE OF THE STATUTE IS TO PROHIBIT THE USE OF FEDERAL FUNDS TO LOBBY CONGRESS. THE STATUTE DOES NOT PROHIBIT THE EXPENDITURE OF APPROPRIATED FUNDS TO LOBBY STATE AND LOCAL GOVERNMENT LEGISLATIVE BODIES. CONSEQUENTLY, IT SEEMS CLEAR THAT 18 U.S.C. SEC. 1913 DOES NOT PRECLUDE THE GOVERNOR OF SOUTH CAROLINA FROM USING FEDERAL GRANT FUNDS IN AN ATTEMPT TO INFLUENCE THE SOUTH CAROLINA LEGISLATURE TO ENACT TAX LEGISLATION REQUIRED BY HIS EDUCATION CAMPAIGN.

SINCE THE EARLY 1950'S. VARIOUS APPROPRIATION ACTS HAVE CONTAINED PROVISIONS PROHIBITING THE USE OF APPROPRIATED FUNDS FOR "PUBLICITY OR PROPAGANDA" PURPOSES TO INFLUENCE LEGISLATION. FOR EXAMPLE, THE ANNUAL TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS ACT, USUALLY CONTAINS A PROVISION ALONG THE LINE OF SECTION 607(A) PUB. L. NO. 96-74, SEPTEMBER 29, 1979, 93 STAT. 559:

"NO PART OF ANY APPROPRIATION CONTAINED IN THIS OR ANY OTHER ACT, OR OR THE FUNDS AVAILABLE FOR EXPENDITURE BY ANY CORPORATION OR AGENCY, SHALL BE USED FOR PUBLICITY OR PROPAGANDA PURPOSES DESIGNED TO SUPPORT OR DEFEAT LEGISLATION PENDING BEFORE CONGRESS."

THE ABOVE-QUOTED PROVISION, HOWEVER, WOULD NOT PROHIBIT THE EXPENDITURES COMPLAINED OF BECAUSE THIS PROVISION ALSO ONLY RESTRICTS THE USE OF FEDERAL FUNDS FOR ACTIVITIES "DESIGNED TO SUPPORT OR DEFEAT LEGISLATION PENDING BEFORE CONGRESS." THE RESTRICTION IS THUS DESIGNED TO PROHIBIT LOBBYING AT THE FEDERAL LEVEL AND DOES NOT APPLY TO EXPENDITURES MADE TO INFLUENCE LEGISLATION BEING CONSIDERED BY STATE AND LOCAL LEGISLATURES. THERE IS NO SIMILAR FEDERAL LEGISLATION WHICH WOULD PRECLUDE THE USE OF FEDERAL GRANT FUNDS IN THE MANNER UNDER DISCUSSION. ACCORDINGLY, WE ARE UNAWARE OF ANY STATUTE APPLICABLE TO THE SITUATION YOU DESCRIBE THAT WOULD PROHIBIT THE USE OF FEDERAL GRANT FUNDS FROM BEING USED TO INFLUENCE LEGISLATION PENDING IN A STATE LEGISLATURE.

WE ALSO REVIEWED OFFICE OF MANAGEMENT AND BUDGET (OMB) CIRCULAR A 87, JANUARY 15, 1981, WHICH PROVIDES PRINCIPLES FOR DETERMINING THE ALLOWABLE COSTS OF

PROGRAMS ADMINISTERED BY STATE AND LOCAL GOVERNMENTS UNDER GRANT FROM THE FEDERAL GOVERNMENT. THE COST PRINCIPLES ARE APPLICABLE TO THE ARC GRANT THAT WE ARE PRESENTLY CONSIDERING. PARAGRAPH D OF ATTACHMENT B OF OMB CIRCULAR A-87 DESCRIBES A NUMBER OF COSTS THAT ARE UNALLOWABLE. THAT PROVISION DOES NOT SPECIFICALLY MAKE EXPENSES ASSOCIATED WITH ATTEMPTS TO INFLUENCE LEGISLATION AN UNALLOWABLE COST UNDER A FEDERAL GRANT TO A STATE OR LOCAL GOVERNMENT.

IN VIEW OF THE FOREGOING, WE HAVE NO BASIS FOR CONCLUDING THAT EXPENDITURES MADE UNDER THE ARC GRANT TO INFLUENCE LEGISLATION BEING CONSIDERED BY THE SOUTH CAROLINA STATE LEGISLATURE WERE IMPROPER.