Nonprofit corporation as "state actor"

Number: INFORMAL

Date: November 20, 2008

Mr. George T. Reeves
Attorney for Madison County
Post Office Drawer 652
Madison, Florida 32341

Dear Mr. Reeves:

On behalf of the Board of County Commissioners of Madison County, you ask whether a private entity which provides fire protection services for the county is a "state actor" such that Federal First Amendment[1] protections and those in Article I, sections 4 and 5 of the Florida Constitution[2] are implicated. If so, you further inquire whether such an entity operates "under color of state law" when holding political rallies unconnected to its fire protection duties such that violations of the First Amendment and Article I, sections 4 and 5 of the Florida Constitution would be actionable by a private party.

You state that Madison County provides fire protection services by contracting with private, non-profit corporations acting as volunteer firefighter organizations. The county funds such services through a municipal services benefits unit by assessment and collection of non-ad valorem special assessments. At times, the private organizations hold fund-raising events such as barbeques, fish fries, cake sales, and the like. During election years, candidates for office are invited to attend these events to speak. The county's role in the activities of the organizations is: dispatching the services; overseeing the expenditure of funds for specific purposes; ownership of some equipment and vehicles used by the organizations; and providing insurance for the vehicles owned by the corporations through the county's general automobile policy.

You indicate that the non-profit corporations are created by persons or entities other than the county and that the county does not exercise control over the internal operations of the corporations or influence the selection of the corporation's officers, members, or employees. According to your letter, the corporation's employees are not county employees and the fire stations are located on privately owned property. Moreover, you state that the county exercises no control over corporate funds other than those provided by the county, the corporations provide no functions other than fire protection to the county, and the county does not require or encourage the corporations to hold fund-raising events.

In this instance, a local citizen has been collecting signatures seeking a referendum on local option pursuant to section 567.01(1), Florida Statutes.[3] At a recent fund-raising event by one of the organizations where public officials were asked to speak, the organization refused to allow the local citizen to collect signatures or promote the call for a referendum. This office has subsequently been advised that the volunteer fire department has allowed the local citizen to collect signatures at its political rally. While you state that this matter is not the subject of litigation, the local citizen has retained counsel and is asserting that such action by the

organization is a violation of the First Amendment of the United States Constitution and of sections 4 and 5, Article I of the Florida Constitution.

Initially, I must state that the determination of whether a private, non-profit organization which provides fire protection services on behalf of a county pursuant to a contract is a "state actor" for purposes of determining whether the organization's actions are actionable as a violation of federal and state constitutional guarantees of free speech is a mixed question of law and fact that may not be resolved by this office. Likewise, whether such an organization's sponsorship of a political rally constitutes "state action" is a factual determination outside the authority of this office. To be of assistance, however, a general discussion of the issues is offered.

To prevail on a First Amendment claim, it is well established that the plaintiff must first make a showing that the defendant is a state actor. Freedom of speech is protected only against abridgement by state action and not against encroachment by private individuals.[4] There is no single test that appears to be applicable to every factual situation.[5] Rather, the United States Supreme Court appears to have evaluated the underlying factual situation and the type of discrimination asserted to apply a range of tests in determining whether the perpetrator is a state actor and its actions rise to the level of government action.

For instance, in *Rendell-Baker v. Kohn*,[6] the Court considered whether a private school whose income was derived primarily from public sources and which was regulated by public authorities acted under color of state law when it discharged employees. The Court found no state action where the discharge of employees was not influenced or directed by any state regulation and it was determined that the school's fiscal relationship with the state was no different from that of contractors performing services for the government, there being no "symbiotic relationship" between the school and the state.

In a later case, the Court found that a private party may be considered a government actor when the party's alleged infringement of constitutional rights is "fairly attributable to the State."[7] Also, the Court has concluded that where the government has created a corporation by special law, for the furtherance of governmental objectives, and has retained the authority to appoint a majority of the directors of that corporation, the corporation is part of the government for purposes of the First Amendment.[8]

In what may be the most recent United States Supreme Court case addressing this issue, the Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[9] considered whether a private, non-profit corporation secondary school athletic association was a state actor subject to suit under federal civil rights law. A private high school sued the association to prevent the enforcement of an association rule that prohibited the use of undue influence in the recruitment of student athletes, arguing that the prohibition violated the private school's right to free speech. The association argued that it could not be sued for a constitutional violation, as it was a private organization and not a government actor.

The Supreme Court found that the association was a government actor because of the pervasive entwinement of state school officials in the structure of the association with the state.[10] It was observed that "challenged activity may be state action when it results from the State's exercise of 'coercive power,' [citation omitted], when the State provides 'significant encouragement, either

overt or covert,' [citation omitted] or when a private actor operates as a 'willful participant in joint activity with the State or its agents,' [citation omitted]." The Court further noted that a "nominally private entity" has been treated as a state actor "when it is controlled by an 'agency of the State,' [citation omitted], when it has been delegated a public function by the State, [citation omitted], when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control,' [citation omitted]."[11]

The Court stressed that specific facts that address any of the above criteria are significant, "but no one criterion must necessarily be applied. When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action in not affected by pointing out that the facts might not loom large under a different test."[12]

The dissent in *Brentwood Academy* offers several instances where there is no state action: when a private entity does not perform a function "traditionally exclusively reserved to the State;" where the entity is not created or controlled by the government for the purpose of fulfilling a government objective; when the state does not exercise coercive power or provide significant encouragement to the entity; or when there is no "symbiotic relationship" between the state and the entity.[13]

The Eleventh Circuit Court of Appeals has set forth the test to determine when private parties will be considered state actors, requiring a court to conclude that one of the following three conditions has been met:

"(1) the state has coerced or at least significantly encouraged the action alleged to violate the Constitution (state compulsion test);
(2) the private parties performed a public function that was traditionally the exclusive prerogative of the state (public function test); or
(3) the state had so far insinuated itself into a position of interdependence with the private parties that it was a joint participant in the enterprise (nexus/joint action test)."[14]

This test, therefore, may appropriately be applied to the situation you have set forth to determine whether the relationship between the county and the non-profit corporation providing fire protection services to the county would lead to the conclusion that the private organization is a state actor when it conducts its fundraising activities and invites political candidates to attend and speak. As noted above, certain aspects of the private non-profit corporation providing fire protection services operate independently from the control of the county. There are several ties with the county, such as the ownership of the equipment, control of funds provided by the county, and insurance coverage which may sufficiently entwine the corporation with the county, creating a valid question of whether the corporation is a "state actor" for purposes of a suit for a constitutional violation of free speech or right of assembly. Ultimately, however, it is a question that should be resolved by a court of competent jurisdiction.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Article I, Const. of the United States, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Article XIV of the Constitution of the United States, makes Article I applicable to the states.

[2] Section 4, Art. I, Fla. Const., protects the freedom of speech and press; s. 5, Art. I, guarantees the right to assemble.

[3] Section 567.01(1), Fla. Stat., requires the board of county commissioners to order an election to decide whether the sale of intoxicating liquors, wines, or beer shall be prohibited in the county upon presentation at a regular or special meeting of a written application signed by one-fourth of the registered voters of the county.

[4] *See* 16B C.J.S. *Constitutional Law* ss. 789-791.

[5] *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) ("[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

[6] 457 U.S. 830 (1982).

[7] *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

[8] *See Lebron v. Natl. R.R. Passenger Corp*., 513 U.S. 374, 400 (1995).

[9] 531 U.S. 288 (2001).

[10] 531 *at* 291.

[11] 531 *at* 296.

[12] 531 *at* 303.

[13] 531 *at* 310-311.

[14] *Rayburn v. Hogue*, 241 F.3d 1341 (Ct. of App. 11th Cir., 2001), *citing NBC, Inc. v. Communications Workers of America*, 860 F.2d 1022, 1026-27 (11th Cir. 1988).