1981 WL 158109 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
January 13, 1981

***1** The Honorable Tobias Gadson, Sr.
Member
South Carolina House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Dear Representative Gadson:
This will reply to your letter of December 26, 1980, requesting an opinion from this office as to the constitutionality of House Bill 2040. The Bill, as enclosed with your letter, permits State employees to authorize payroll deductions from their salaries for payment to the United Fund or The Good Health Appeal. All other combined campaigns or campaigns by individual charities are precluded from direct payroll deductions, although employee may designate contributions through the United Way and Good Health Appeal to non-member health and welfare organizations, if the organizations are tax exempt, registered with the State of South Carolina, and provide direct and continuing service to citizens of the State.

The constitutionality of similar statutes dealing with State payroll deductions for charitable contributions is currently being litigated in several jurisdictions. See, e.g., National Black Fund, Inc. v. Campbell, 494 F.Supp. 748 (D. D. C. 1980) (this case is currently under appeal to the Court of Appeals for the District of Columbia); Pilsen Neighbors Community Council v. Burris (Northern District of Illinois, Eastern Division, C/A No. 80 C 5501) (this case is still being litigated in the federal district court) International Services Agencies vs. O'Shea, Supreme Court of New York, Albany County Special Term, Calendar No. 50 (February 8, 1980). At present, neither the United States Supreme Court nor our own State Supreme Court has considered this particular issue, although we suspect one or more of the above actions will eventually reach the United States Supreme Court.

At the outset is should be noted that solicitation of contributions by charities is clearly a form of expression protected by the First Amendment. Schaumburg v. Citizens For Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). The foremost issue being litigated presently is whether legislation permitting charitable solicitation of public employees creates a ‘public forum’, requiring that any limitations on First Amendment rights be: 1) reasonable time, place or manner restriction; 2) permissible subject matter regulation; or 3) a narrowly tailored means of serving a compelling state interest. If a ‘public forum’ is not created, then a more relaxed standard of reasonableness would be applied to limitations imposed by government.

In examining the nature of the forum for purposes of free speech, the United States Supreme Court has, in the past, drawn a distinction between open spaces such as parks, street corners, meeting halls, public thoroughfares, etc., and other types of public facilities. See, e.g., Addrely v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) (jail is not a facility appropriate for public expression); Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (military base is not a public forum); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (prison is not a public forum); Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (city bus is not a public forum). In each of the foregoing cases, the United States Supreme Court recognized that government was exercising its proprietary function by restricting certain types of expression and insuring that facilities were utilized for their intended purposes. Although the Court in City of Charlotte v. Local 600, International Association of Firefighters, 426 U.S. 283, 96 S.Ct. 2036, 48 L.Ed.2d 636 (1976) did not utilize the ‘public forum’ analysis in upholding the municipality's refusal to withhold union dues from its firemen's checks, it did apply the relaxed standard of reasonableness indicating that the Court considered the municipality's action to be a proprietary function which created no ‘public forum’. A different result was reached, however, when government expressly permitted such activity as in this case by authorizing payroll deductions for charitable contributions. In National Black United Fund, Inc. v.

Campbell, supra, the United States District Court for the District of Columbia held that the United States Government had created a public forum when it established a 'Combined Federal Campaign', which permitted qualifying charitable organizations to solicit directly from federal employees through payroll deductions. The Court further found that any limitation on the rights of such charities to solicit from federal employees must meet the strict scrutiny test. While this decision is currently under appeal, it is our opinion that the decision is based on sound reasoning and will probably be affirmed. Therefore, we have examined your proposed Bill applying the strict scrutiny test, and in this light we have serious reservations as to its constitutionality. The Bill only permits two organizations, the United Way and Good Health Appeals, to receive payroll deductions. We are at a loss to determine any compelling State interests that would justify two organizations receiving payroll deductions, but excluding all other organizations without exception. The compelling interests normally asserted—i.e., prevention of fraud, promotion of efficiency and effectiveness, easing of administrative burdens—do not appear reasonably related to the broad exclusion in this Bill. Moreover, the limitation to two charitable organizations would not appear reasonable as a time, place or manner restriction. While it is true that other charities may receive contributions designated through the United Way or the Good Health Appeal, the Court in National Black United Fund rejected the existence of such alternative means of solicitation as a justification for denial of charitable organizations rights to solicit funds directly. Therefore, in the absence of a compelling State interest, the First and Fourteenth Amendments require that payroll deductions be available to all charitable organizations on an equal basis. National Black United Fund v. Campbell, supra. Moreover, H. 2040 might fail to pass the more relaxed standard of reasonableness, should the Supreme Court eventually rule that charitable solicitation by payroll deductions does not create a 'public forum'. The Bill does not create any standards for determining if other charitable organizations might qualify for payroll deductions, but arbitrarily designates only two such organizations as qualifying. The argument that efficiency is promoted and administrative costs decreased by limiting the number of organizations for which government must collect deductions is weakened by the fact that two organizations have been designated instead of one. We also know of no empirical data which would establish any substantial cost savings to State government by limiting payroll deductions in such fashion.

***2** In conclusion, we would like to emphasize that there is no constitutional requirement that the General Assembly permit charitable organizations to solicit contributions from State employees through payroll deductions. However, if the General Assembly does, by legislation, permit this First Amendment activity in State offices, then any limitations on that right must be reasonable and narrowly drawn to serve some compelling State interest. We feel that H. 2040, by failing to permit direct deductions by other qualifying charitable organizations, does not meet this requirement. If you should need any further advice on this matter, please do not hesitate to contact me.

Very truly yours,

Richard B. Kale, Jr.
Senior Assistant Attorney General

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