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January 11, 2006

Lynn Y. Tran
Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: MUR 5550

Dear Ms. Tran:

The University of Cincinnati ("University") is in receipt of your letter dated December 19, 2005 seeking additional information regarding the Complaint filed with the Federal Election Commission ("FEC") in November 2004. In particular, you noted the FEC is "willing to consider any additional information [the University] may choose to submit on a voluntary basis to clarify the information conveyed to [Michael] Moore regarding the 'boundaries of acceptable' speech."

I. University of Cincinnati did not make payment in connection with an election

At the outset, the University believes it is important to reiterate that it did not make any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or provide any services or anything else of value, to any candidate, campaign committee, or political activity or organization, in connection with any election. As noted in the University response on December 10, 2004, payment provided to Mr. Moore for his speaking fee was not made "in connection with" or "for the purpose of influencing the" the 2004 presidential election. Rather, Mr. Moore was brought to the University campus, not by administrators of the University, but by University students. The funding request came from student groups, the funding allocation was made by a student group, and the funds were provided by students.

II. Michael Moore's appearance was for the purpose of hearing the opinions of a controversial filmmaker and to encourage students to get out and vote

You have asked the University to provide additional information demonstrating what efforts were made to ensure that the criteria for candidate appearances were met as set forth in 11 C.F.R. Section 110.12(b)(1)-(2). Notwithstanding the University's position that Section 110.12(b)(1)-(2) is not applicable (see below), the purpose of the student groups for bringing Mr. Moore to the University of Cincinnati was to "bring a big name filmmaker to campus to

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discuss relevant issues” and to encourage student to get out and vote (See December 10, 2004 Response). In particular, during this time, Mr. Moore’s most recent documentary, *Fahrenheit 9/11*, was receiving much media attention. Bringing the Director of this film to the campus at a reduced appearance fee offered students a unique opportunity to hear the thoughts and views of a controversial public figure.

But, like most higher education institutions, the University of Cincinnati seeks to create a climate where students are given every opportunity to hear opposing and diverse viewpoints. Indeed, shortly after Mr. Moore’s visit, the Programs and Activities Council, the same student run organization that assisted in bring Mr. Moore to campus, showed a screening of *Fahrenheit 9/11*, which is a rebuttal to Mr. Moore’s film and is billed as “Unraveling the truth about Fahrenheit 9/11 and Michael Moore” (See Exhibit 4 of December 10, 2005 Response. Also see www.fahrenheit911 for additional information). It is important to note that the David Hardy, the same individual who has brought this Complaint to the FEC, is featured in this film.

Thus, the speech that occurs on the University campus, often the result of what students seek or decide upon, offers the University community the opportunity to hear conflicting views and to have their thoughts and beliefs challenged, all within a community that pursues quality in learning and scholarship, practices civility, and embraces independent thinking and the free and open expression of ideas. (See attached Exhibit A—“University’s Just Community Principles”). The decision of University students to have both Mr. Moore appear on campus and to have a screening of *Fahrenheit 9/11* are central ingredients in the University embracing its role as a learning community.

This is not to say that the University itself, once it found out about Mr. Moore’s appearance, was of the understanding that Mr. Moore would not bring with him references or commentary about political figures, including those of President George Bush and/or Senator Kerry. But universities historically have sought to promote the free exchange and debate of ideas and to stimulate student interest in the democratic process and world events. And here, neither the University nor the student groups sponsoring the event ceded control of the outdoor venue to Mr. Moore. That is, the event was open to anyone who wanted to attend with admission not based on spectators’ party affiliation, or any other indications of support for or opposition to a particular candidate or party. Indeed, the appearance was in an outdoor public venue, McMicken Commons, which can be used free of charge for events and speakers so long as they are sponsored by University students.

And as noted in the University’s response on December 10, 2004, while the University was aware of the event, the University did not promote the event, it did not may any public statements, oral or written, which could be perceived as University support or endorsement of the event, and no University official appeared at the event with Mr. Moore. The complainant himself does not contend that the University or any agents or employees of the University expressly advocated the election of or defeat of either President Bush or Senator Kerry during

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Michael Moore's appearance. Most importantly, the University did not believe or view this event to be campaign rally as Mr. Moore was speaking for himself, not a particular candidate, and the students groups sponsoring the event viewed it as an opportunity to get their fellow students thinking about current events and the upcoming election.

III. 11 C.F.R. sections 110.12(b) and 114.4(c)(7)(ii) are not applicable

It is the position of the University that 11 C.F.R. sections 110.12(b) and 114.4(c)(7)(ii) are not applicable with respect to Mr. Moore's appearance on campus. The relevant language in both sections provide that educational institutions may sponsor appearances by "candidate, candidates' representatives or representatives of political parties on educational institution's premises at no charge or at less than the usual and normal charge" so long as certain requirements are met.

A. Mr. Moore was not a candidate or a representative of a candidate or a political party

Here, Mr. Moore was not, nor to the University's knowledge, was he a candidate, a candidate's representative, or a representative of a political party at the time of his appearance. Indeed, it is worth noting that neither the University's College Democrats nor College Republicans was a named student group sponsor for the event. Nor did the College Republicans or College Democrats seek funding to pay for Mr. Moore's appearance.

It is also important to note that the complainant, Mr. Hardy, has not argued that Mr. Moore was an official agent or member of the Kerry campaign or committee. Rather Mr. Moore was a private individual during the 2004 election and during his appearance on the University campus. Unquestionably, the FEC does not regulate or restrict expressions of opinions by private individuals, despite how public that individual might be.

In a review of the advisory opinions, reports, and rulings of the FEC with respect to appearances by candidates and representatives of candidates, the University has been unable to unearth authority regarding the limits of speech that can be placed upon an appearance by an individual who is not a candidate, a candidate's representative, or a representative of a political party. While the absence of authority does not necessarily make it so, it appears rather obvious that there is no authority or guidance because the federal election laws would not apply to the opinions of private individuals, whether those opinions are expressed by a local store owner or by a public filmmaker as controversial as Michael Moore.

The complainant apparently suggests that Mr. Moore's student sponsored appearance at the University provided a benefit to Senator Kerry and his campaign. Yet, Mr. Moore's speech was no different than the speech expressed by the local newspaper editor or local or national radio host. And one would suggest that benefits conferred to a candidate or political party by a talk show host or a newspaper editorial should be curtailed. The U.S. Supreme said

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as much when holding “. . . that Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a benefit on the candidate.” *McConnell v. FEC*, 540 U.S. 93, n. 51. Thus, given that Mr. Moore was acting on his own, and not as a candidate or a representative of the candidate or political party, 11 C.F.R. sections 110.12(b) and 114.4(c)(7)(ii) are not applicable.

B. The use of the University's free speech area was at the usual and normal charge

What is more, 11 C.F.R. sections 110.12(b) and 114.4(c)(7)(ii) appear to be triggered when a candidate is given something of value, such as the use of a university facility at a rate below the usual or normal charge—whether that rate is nominal or free. Here, even if Mr. Moore was a candidate or a representative of a candidate, his use of a public outdoor forum, McMicken Commons, for free was consistent (or usual and normal) with any other speaker who is sponsored by a University student group. Consequently, no impermissible contribution was made.

McMicken Commons, the location where Mr. Moore spoke, is designated as a free speech area. Individuals or groups wanting to use McMicken Commons must schedule the activity in the Campus Scheduling Office. There is no charge for the use of McMicken Commons. Indeed, no rental charge is made for the use of any University facility so long as the non-University group or speaker is sponsored by a University student group. See Attached Exhibit B “University of Cincinnati Use of Facilities Policy Manual,” pages 1, 2, and 12).

The use of McMicken Commons by Mr. Moore was not giving anything of value to a candidate or party as there was nothing to give away. That is, the use of McMicken Commons, like that of a public park, is free for anyone to use so long as they have met the requirements of the University facility use policy. Thus, Mr. Moore's use of the University's free speech area was at its usual and normal charge and its fair market value—free. Since Mr. Moore did not receive a benefit at a less than the usual and normal charge, it is 11 C.F.R. Sections 110.12(a) and 114.4(c)(7)(i) that are applicable in this matter, not 11 C.F.R. Sections 110.12(b) and 114.4(c)(7)(ii).

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IV. Conclusion

The University of Cincinnati, for the reasons submitted in this response and in its December 10, 2004 response, respectfully submits that there is no reason to believe that a violation of FECA has been committed and requests that this matter be dismissed in its entirety.

Very truly yours,

Jan Alan Neiger
Associate General Counsel
University of Cincinnati

cc. *President Nancy Zimpher*

State of Ohio)
) ss.
County of Hamilton)

Jan Alan Neiger, being first duly sworn, deposes and says:
I have indeed written the above, and understand it to be true and correct.


Jan Alan Neiger


My Commission expires



JO ANNE ACKERMAN
Notary Public, State of Ohio
My Commission Expires 05-14-06

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Just Community

Just Community Principles

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Quick Email Links

Let us know how we can make this a better resource for the University of Cincinnati

Please contact us at
Just Community@uc.edu ✉

You can Subscribe to the Just Community email discussion list by sending the command.

SUBSCRIBE Just-Community-L
yourname
to the listserver at
maillist@uc.edu ✉

Sharing a Commitment for a Just Community

The University of Cincinnati is a public comprehensive system of learning and research that serves a diverse student body with a broad range of interests and goals. The faculty of the University produces world-renowned scholarship- and nurtures innovation in and out of the classroom. As well, the faculty, staff, and administration support an educational setting of excellence, opportunity, and service.

In embracing our roles within this learning community, we subscribe to the defining purposes, traditions, and diversity of the University of Cincinnati. Through our actions, we will strive to make the University of Cincinnati a more caring and just community.

As members of this community, we will

Pursue Learning and Scholarship

by building on successes, learning from mistakes, and pursuing quality in teaching, research, and creative endeavors

Strive for Excellence

by aspiring to achieve our fullest potential in our educational and personal pursuits

Celebrate the Uniqueness of Each Individual

by respecting individual differences and promoting common interests

Practice Civility

by extending to those we meet the same respect, cooperation, and caring that we expect from others

Embrace Freedom and Openness

by working to create an environment that is safe and affirming, one that nurtures independent thinking and the free and open expression of ideas

Seek Integrity

by aspiring to the highest moral and ethical standards

Promote Justice

by working to build a learning environment that offers everyone an equal opportunity to grow, flourish, and contribute

Accept Responsibility

by striving to build learning community committed to these common values and principles

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**University of
Cincinnati
Use of Facilities
Policy Manual**

Revised & Approved: 2001

UNIVERSITY OF CINCINNATI

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GENERAL POLICIES PERTAINING TO THE USE UNIVERSITY FACILITIES

The policies stated herein were developed by the Use of Facilities Policy Committee. They were approved by the Academic and Administrative Councils and the President of the University of Cincinnati and are administered and interpreted by the appropriate scheduling office. Appeals related to the application of these policies are to be referred to the Use of Facilities Policy Committee for review. These policies are not applicable to Office of Housing and Food Services (residential facilities), Hospital or patient care areas which have their own separate policies.

The facilities of the University are the property of the State of Ohio, and are subject to all applicable state laws, rules and regulations.

The following priority is used for scheduling facilities:

1. Academic classes.
2. Academic related activities.
3. Activities sponsored or co-sponsored by the University or a University group.
4. Activities sponsored by a non-University group.

A non-University group may reserve facilities only if comparable facilities are not available commercially elsewhere in the local community. Requests by non-University groups for use of University facilities for activities which are in competition with the University's educational or cultural offerings (classes, seminars, etc.), are not approved. Determination of whether competition exists is decided by the appropriate scheduling office in consultation with academic and administrative units.

The University of Cincinnati reserves the right to change facility assignments or to cancel any previously scheduled facility if such change or cancellation is made to meet University needs. The University is not responsible for any costs or damages suffered by a sponsoring group as a result of such change or cancellation.

The sponsor must conduct an event in a manner that complies with all policies regarding the use of University facilities. The sponsor assumes total responsibility including, but not limited to financial and legal obligations for an event using University facilities. Specific smoking and use of alcohol regulations apply to University facilities and are detailed in Appendices B and C. Groups or individuals who sponsor an event are responsible for any loss or damage incurred by the University resulting from their occupancy of University facilities.

Rental Charges and Expenses

A standard rental charge is made for the use of University facilities by a non-University group. No rental charge is made for the use of facilities for an event sponsored by the University or a University group held during hours when campus buildings are regularly open unless admission is charged or donations are requested. No rental charges are made for the use of facilities for events if the University is compensated through other direct methods, i.e. tuition, fees, and/or grants. Rental charges may be obtained from the appropriate scheduling office. Student organizations sponsoring events involving admission charges or donations must obtain approval of the Student Organizations Financial Advisor. All rental charges are payable two weeks in advance of the event. Charges are assessed all groups for all direct expenses incurred as a result of occupancy beyond regular hours, special equipment, set-ups, services, and personnel required to service an event. All charges are based on the University Schedule of Charges for Use of Facilities on file in the appropriate scheduling offices. Requests for exceptions to established charges or advance payment are referred to the Use of Facilities Policy Committee.

Payment of all charges for the use of University facilities and services is the responsibility of the group and/or the agent representing the group. If the group does not meet its financial obligations to the University, the individual who requested use of the facility is responsible for the payment. University groups which co-sponsor an event with a non-University group or organization are responsible for any financial and legal obligations incurred if not settled by the non-University group. Non-University groups must pay all outstanding charges within thirty (30) days following issuance by the University of a statement of charges incurred unless otherwise stipulated in a signed contract.

Food service requests should be arranged through the appropriate scheduling office for each facility. For regulations governing the purchase and consumption of alcoholic beverages, see Appendix C.

Storage

The University does not provide for equipment storage by individuals or groups scheduling facilities. Equipment storage is the responsibility of the individuals or groups.

Speakers, Speech and Assembly

The following policies have been formulated to assure to all members of the campus community the right to inquire, to speak, to hear, and to assemble peaceably, reflecting the rights of academic freedom and the obligations of academic responsibility.

All members of the University community shall honor the freedom of each individual within that community in matters of speech, learning, inquiry, hearing, and peaceful assembly. No one may interfere with the rights of others to pursue teaching, study, class attendance, research, learning, or administrative duties.

Any University group may invite speakers to address their organization at any time. In the interest of intellectual integrity and academic responsibility, any group sponsoring a series of speakers should endeavor to present all sides of a controversial subject. The name of the speaker must be supplied on the scheduling application in the appropriate scheduling office no later than five days in advance of the meeting.

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The Campus Scheduling Office, 601 Dabney Hall (556-2442) is responsible for scheduling all University facilities including exterior open space on West Campus when they are not in use for academic purposes. The implementation of University policies and charges related to the use of facilities is also the responsibility of the Campus Scheduling Office. Individuals wanting to schedule meetings, conferences, workshops, institutes, concerts and other events requiring University facilities, housing, food services, parking, etc., must make arrangements in this office. College of Medicine facilities are scheduled by Medical Art and Design Services (MADS), Room E-401 MSB, 231 Bethesda Avenue, Cincinnati, OH 45267-0574, 558-5447. Facilities may be used only when scheduled and confirmed in advance. An Application to Schedule Facilities must be completed for each event and submitted to MADS for approval.

The scheduling of facilities on branch campuses and athletic facilities, including notification to the Campus Scheduling Office and the implementation of University policies regarding their usage, has been delegated to the offices listed in Section IV of this Manual.

Facilities are not officially reserved or confirmed until a signed confirmation copy of the application is received by the applicant from the office. An event should not be advertised or promoted until formal confirmation is received. If use of a reserved facility is to be cancelled, the sponsor or co-sponsor must notify the appropriate scheduling office as soon as possible and should also cancel arrangements for equipment, personnel, and services made in connection with the event. Written notice of cancellation or changes relating to an event should be received by the appropriate scheduling office no later than three working days prior to the event. The sponsor and co-sponsor are responsible for all costs incurred by the University for events which are reserved but subsequently cancelled.

Free Speech Area

The northwest section (see diagram) of McMicken Commons immediately east of McMicken Hall on the West Campus is designated as the free speech area. Individuals or groups wanting to use these areas must schedule the activity in the Campus Scheduling Office. Anyone violating this policy may be charged with trespassing. No more than one musical or speaking activity is permitted at the same time.