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DEVAL L. PATRICK
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LIEUTENANT GOVERNOR

MEMORANDUM

TO: All Employees of the Executive Branch
FROM: William "Mo" Cowan, Chief Legal Counsel
Mark A. Reilly, Deputy Chief Counsel
DATE: March 15, 2007 (revised April 20, 2010)
RE: Restrictions on Political Activities by Compensated State Employees

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As state employees, we are obliged to understand and comply with the laws concerning political activity by state employees. This memorandum summarizes the major rules governing how and when compensated state employees may participate in political activity. This memorandum cannot address every situation and we encourage you to contact the General Counsel or other designated lawyer in your department or agency, or the State Ethics Commission or the Office of Campaign and Political Finance, if you wish to discuss a particular question.

The basic principles are that public employees may not engage in political activity on public time and that public resources are to be used for governmental purposes, and not for political or other personal activities.

In most cases, you as an individual are free to engage in political activity on your own time, subject to the limitations outlined below. "Political activity" includes any activity that supports or opposes a federal, state or local candidate or political party or a state or local ballot question. You may not, however, solicit or receive, directly or indirectly, any contribution or anything of value for **any** political purpose.

The general guidelines are as follows.

YOU MAY NOT:

1. Use any public resources, including those of any city, town, authority, or subdivision of the Commonwealth, for campaign or other political purposes. "Public resources" means virtually anything that is paid for by the taxpayers, including computers, email accounts, office equipment and supplies, vehicles, buildings and the paid time of public employees. For instance, you may not:

- for campaign or other political purposes, use publicly provided utilities, computers, email accounts, blackberries, telephones, postage, postage machines, copying machines, typewriters, or fax machines;
- use state resources to prepare or deliver campaign statements; or
- use state resources in connection with press conferences or press availabilities for predominantly campaign purposes.[1]

2. Engage in **any** campaign or political activity during regular work hours. If you wish to engage in political activity during your lunch break, you must schedule the time of your break with your supervisor in advance.[2] This means that during work hours you may not, for example:

    - go to the offices of the Republican or Democratic State Committees;
    - write, edit or proofread campaign speeches;
    - perform advance preparation work for campaign appearances; or
    - hold signs, make telephone calls, write letters or stuff envelopes for campaign purposes.

    You may engage in campaign or political activities on your own time only, which would include **vacation** time or **personal** time. Your timesheet must reflect any such personal or vacation time.

3. Use the state seal or coat of arms, even on privately purchased stationary or other materials in connection with campaign or political purposes.

4. Use your official title in connection with any political activity that you engage in on your own time.

5. Solicit or receive, directly or indirectly, any contribution or anything of value for **any** political purpose. "Political purpose" includes fundraising activity on behalf of any candidate or political committee, including parties, political action committees and ballot question committees on any level—local, state or federal. You may not, for example:

    - serve as treasurer of a political campaign;
    - identify or provide names to a political committee to be solicited;
    - participate in fund-raising committees or fund-raising planning meetings;

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[1] While you may answer spontaneously questions posed by the press, the best practice is to refrain from commenting publicly on political campaigns and candidacies at your workplace unless you obtain permission in advance from the State Ethics Commission to do otherwise.

[2] You may not, however, engage in political fundraising even during your lunch break, since M.G.L. c. 55, § 13 prohibits public employees from soliciting or receiving political contributions at any time, i.e., even during non-work hours. This restriction does not apply to elected officials.

- make or threaten to make any government benefits, business or employment contingent on contributions of funds or services to any campaign;
- be the featured speaker at a political fund-raising event;[3]
- allow your name to be used on a political committee's stationary if the stationary is used in soliciting funds;
- host a fund-raising event at your home;[4]
- distribute or sell tickets to political fund-raising events; or
- perform any volunteer work that is directly connected with political fund-raising.

6. Represent anyone other than the Commonwealth, including a campaign committee, in connection with any matter in which the Commonwealth is a party or has a substantial interest.

7. Solicit campaign assistance from anyone who has a matter pending before you or before any of your subordinates.

8. Require other state employees to contribute to or participate in campaign activities, or penalize state employees who do not contribute to or participate in campaign activities in their spare time.

9. Use confidential information gained by reason of your official position to engage in any political activity, including political fund-raising (or for any other personal interest). Confidential information may include, but is not limited to: databases, names, addresses, telephone numbers, and e-mail addresses.

<u>YOU MAY</u> (subject to the above restrictions):

1. Be a member of a political organization or committee;

2. Make a political contribution within legal limits, as long as the contribution is given to a campaign committee, and not to another employee;

3. Donate your time to a political campaign outside of working hours, including on vacation time (as long as you do not participate in fundraising activities for a political campaign at any time);

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[3] According to the Office of Campaign and Political Finance ("OCPF"), state law does not prohibit a public employee from attending and speaking about non-fundraising matters at a political fundraiser (provided that the public employee's attendance and remarks are not used as a "draw" to the event or to otherwise enhance political fund-raising efforts).

[4] OCPF has determined that the spouse of a state employee, under particular circumstances, may host a fund-raising event in his or her home, even if the home is jointly owned by the state employee. However, the state employee must not participate in any way in soliciting or receiving contributions.

4. Attend political fund-raisers, although you may not be used as a "draw" for an event;

5. Run for political office, provided a committee is organized to solicit and receive contributions on your behalf. Before you run for office, you must ask your supervisor whether it can be done consistent with your obligations to the Commonwealth. Your committee must ensure that it does not solicit or receive contributions from any person having an interest in any particular matter in which you have participated during the course of your employment or which is the subject of your official responsibility.

For further information about how the Conflict of Interest law regulates political activity, consult the State Ethics Commission at (617) 371-9500 or the Commission's Revised Advisory on Political Activity (No. 84-01), which can be found at: http://www.mass.gov/?pageID=ethterminal&L=4&L0=Home&L1=Education+and+Training+Resources&L2=Educational+Materials&L3=Advisories&sid=Ieth&b=terminalcontent&f=legal_adv8401&csid=Ieth For further information about how the Campaign Finance law applies to public employees, consult the Office of Campaign and Political Finance at (800) 462-OCPF or at www.state.ma.us/OCPF, or the OCPF's Campaign Finance Guide, which can be found at: http://www.ocpf.net/guides/guide_pub_emp.pdf.

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MEMORANDUM

TO: Employees of the Executive Branch Subject to the Hatch Act
FROM: William "Mo" Cowan, Chief Legal Counsel
Mark A. Reilly, Deputy Chief Counsel
DATE: April 20, 2010
RE: Further Restrictions on Political Activities by Certain State Employees

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This memorandum supplements the memorandum circulated today concerning the restrictions on political activities by all state employees. In addition to those restrictions, which apply to everyone who is employed by the state, the federal Hatch Act applies to employees in any state agency whose principal employment involves an activity financed in whole or in part by federal loans or grants.

Under the Hatch Act, such employees, for example:

- May not run for nomination or be a candidate for public office in a partisan election (there is no prohibition on running for public office in a nonpartisan election);
- May not use their official authority or influence to interfere with or affect the results of an election or a nomination for office; and
- May not directly or indirectly coerce contributions from subordinates in support of a political party or candidate.

If you have any questions about whether you are covered by the Hatch Act, or how its prohibitions apply in a particular situation, I encourage you to contact the General Counsel or other designated lawyer in your department or agency. For further information about the Hatch Act, you may also consult the U.S. Office of Special Counsel website on this subject, which is available here: http://www.osc.gov/hatchact.htm.

Commonwealth
of Massachusetts

OCPF Online
www.mass.gov/ocpf
Office of Campaign and Political Finance
One Ashburton Place, Room 411
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INTERPRETIVE BULLETIN

The Use of Governmental Resources for Political Purposes

This office frequently is asked about the extent to which public resources may be used for political purposes, most often whether public resources may be used to distribute information to voters concerning a municipal ballot question. In addition, questions have been asked regarding whether public facilities, especially buildings and other property, may be used by groups supporting or opposing a particular ballot question or candidate.

In general, the campaign finance law prohibits the use of public resources for political purposes, such as public employees engaging in campaign activity during work hours or using their office facilities for such a purpose. For example, a candidate who also works in a public office may not use the office phones or computer to conduct campaign work.

The law prohibits the use of public funds or other public resources to support or oppose a question put to voters, such as the use of public resources to distribute a mailing days before an election. The law does not, however, prohibit the expression of views by public officials concerning ballot questions to the extent such expression is within the scope of their official responsibilities and protected by the First Amendment.

I. Scope of the restriction, in general

In Anderson v. City of Boston, 376 Mass. 178, 187, 380 N.E.2nd 628 (1978), appeal dismissed, 439 U.S. 1069 (1979), the Supreme Judicial Court indicated that public resources may generally not be used for political purposes. In that case, the court concluded that the City of Boston could not use public funds to set up an office "for the purpose of collecting and disseminating information about the impact" of a ballot question. The court stated that the campaign finance law is "comprehensive legislation" which "preempt[s] any right which a municipality might otherwise have to appropriate funds for the purpose of influencing" the outcome of a ballot question. 376 Mass. at 185-186.

The court pointed to Section 22A of Chapter 55, which states that "[n]othing contained herein shall be construed as authorizing the expenditures of public monies for political purposes." The court also stated that:

> [T]he Legislature may decide, as it has, that fairness in the election process is best achieved by a direction that political subdivisions of the State maintain a "hands off" policy. It may further decide that the State government and its various subdivisions should not use public funds to instruct the people, the ultimate authority, how they should vote.

376 Mass. at 194-195.

The analysis in Anderson applies to the Commonwealth and its "political subdivisions," which use taxpayer or rate payer funds. 376 Mass. at 193. Political subdivisions of the commonwealth include all agencies within the state government, and within county, regional, town and city governments. State authorities, e.g., the Massachusetts Port Authority and the Massachusetts Turnpike Authority, and state institutions of higher education are subject to the restrictions articulated in the case. See § 179 of ch. 655 of the Acts of 1989. In addition, the Anderson decision applies to municipal utilities that rely on fees paid by ratepayers. See AO-95-42. Finally, non-profit organizations that are supported by state tax revenues and other public funds may not use such revenues to support or oppose a candidate or a ballot question. See AO-95-41 and AO-96-25.

"Governmental resources" include anything that is paid for by taxpayers, e.g., personnel, paper, stationery and other supplies; offices, meeting rooms and other facilities; copiers, computers, telephones, fax machines; automobiles and other equipment purchased or maintained by the government. A bulk mail permit is also considered a governmental resource.

Chapter 55 was enacted to regulate "**election** financing." Anderson, 376 Mass. at 185 (emphasis added). The prohibition on the use of governmental resources for political purposes therefore applies to all expenditures made to promote or oppose a matter placed before voters at the polls, such as a ballot question. In municipal elections, the Anderson restriction and other provisions of the campaign finance law are generally triggered once the appropriate municipal authority, i.e., the board of selectmen, city or town council or mayor, decides to place the question on the ballot. See IB-90-02. However, there are cases where the law would apply to activity undertaken before a question is officially placed on the ballot. Funds spent prior to a question being "on the ballot" may also be subject to campaign finance law if the funds are spent to influence the outcome of an anticipated ballot question. Id.

Although it applies to anticipated ballot questions, the prohibition does not extend to expenditures made to discuss policy issues (e.g., the need to renovate aging school buildings), which currently are not the subject of a scheduled or anticipated ballot question, but may at some **undetermined** future point become the subject of a ballot question. On the other hand, the prohibition does not apply to expenditures concerning public policy issues that are not, and are not expected to be, the subject of an election. An example would be an issue that is on the warrant for a town meeting only, as noted later in this bulletin.

This bulletin deals largely with the publicly funded distribution of information, especially

printed matter, as it relates to the Anderson restriction. Such distribution is the most common source of questions and complaints to OCPF. This bulletin does not, however, concern the speech of public officials concerning a ballot question, such as comments supporting or opposing a question or statements made during public meeting. Such comments are generally unrestricted by the campaign finance law. See Interpretive Bulletin IB-92-02, "Activities of Public Officials in Support of or Opposition to Ballot Questions."

II. Distribution of information relating to ballot questions

Public officials often wish to distribute, or assist others in distributing, information relating to ballot questions at public expense. Such distribution is appropriate only if it is consistent with Anderson. As discussed below, public officials may prepare and make available certain information since such activity is consistent with their official responsibilities. Examples of such allowable actions would be preparing material and giving out copies at official meetings or sending it to voters who have requested more information. This type of activity is limited in scope and, in general, complies with Anderson.

In contrast, the use of public resources to make an unsolicited distribution of information relating to the substance of a ballot question, such as a blanket mailing or other publicly funded dissemination of material, outside of an official meeting, would not comply with Anderson. The general rule is that governmental resources may *not* be used for distribution of voter information commenting on the substance of a ballot question. The prohibition applies whether the material that is distributed advocates for or against a question (it is "advocacy") or simply purports to be objective and factual (it is "informational"). As noted above, Anderson prohibits the distribution of advocacy material. As for informational material, the Secretary of the Commonwealth has concluded that the Home Rule Amendment of the Massachusetts Constitution prohibits municipalities from distributing such material in the absence of legislation specifically providing such authority.

Only eight municipalities currently have such authority to distribute informational material: Newton (Chater 274 of the Acts of 1987), Cambridge (Chapter 630 of the Acts of 1989), Sudbury (Chapter 180 of the Acts of 1996), Burlington (Chapter 89 of the Acts of 1998), Dedham (Chapter 238 of the Acts of 2002), Lancaster (Sections 285-288 of Chapter 149 of the Acts of 2004), Yarmouth (Chapter 404 of the Acts of 2006), and Shrewsbury (Chapter 427 of the Acts of 2006). In addition, there is at least one other exception that this office is aware of: M.G.L. c. 43B, § 11, which directs the city council or board of selectmen to distribute the final report of a charter commission to voters.

Two examples illustrate the circumstances in which the office most often finds that information has been distributed in violation of Anderson. Both concern the preparation and distribution of information that deals with a ballot question, though the method of distribution varies in each example.

1) A board of selectmen uses public funds to prepare and distribute a mailing to all town residents concerning an upcoming Proposition 2 ½ override. The mailing either argues for a yes vote or provides arguably "objective" information about the question. If the mailing calls for a particular vote, it is an inappropriate use of public resources and violates Anderson. Even if the mailing simply provides "information" concerning the question, however, and may reflect an effort to be neutral, it is not consistent with the Home Rule Amendment.

2) A public school system prepares and distributes to teachers a flyer similar to the one noted in the first example. While there is no town-wide mailing, public resources are still used: school resources to prepare or copy the flyer, and the time of teachers in distributing it to students. Therefore, school officials should not ask children to take literature (including literature prepared by a parent/teacher organization) regarding the substance of a ballot question home from school to give to parents.[1] See AO-94-11.

Although the scope of the general rule prohibiting distribution of public resources is broad, there are several exceptions. They are discussed in greater detail below.

A. Distribution of information relating to Town Meeting

In addition to consideration by voters at the polls, some ballot questions, such as Proposition 2½ overrides and debt exclusions, also involve review by town meeting or a city or town board in the weeks and months prior to, or shortly after, an election.

The campaign finance law does not regulate expenditures of public funds made for the purpose of lobbying town meeting or city or town boards or for other purposes not designed to influence voters at an election. See AO-93-36 and AO-94-37 (stating that the campaign finance law does not regulate expenditures made primarily to affect the deliberations on a warrant article at town meeting). Municipal officials may therefore use public resources to distribute information regarding a warrant article to residents prior to a town meeting, as long as the material is distributed primarily to influence the town meeting.

Material distributed using public funds prior to a town meeting may not advocate a position on a ballot question. For example, a report summarizing or supporting a warrant article pending before town meeting may not also urge a vote in a subsequent town election.

In addition, because it is not always easy to determine the primary purpose of material distributed before a town meeting and related election, municipal officials *should be careful to avoid any discussion regarding an election* in such material. Even if it does not expressly urge a vote in an election, any discussion regarding an election in a flyer or other document distributed using public resources may raise an inference that the document is being distributed to influence the election.

There are, however, limited circumstances where the mere mention of an election in a document that is distributed using public resources prior to a town meeting would not violate the campaign finance law. For example, the town meeting warrant may include a reference to a subsequent election, especially in the context of a town meeting vote that is contingent on an override vote. In addition, a town's finance committee may use governmental resources to distribute a booklet containing its report and recommendations on warrant articles, if the recommendations are limited in scope to the warrant articles and the content of the booklet would reasonably be seen as primarily providing information in connection with town meeting, not the election which may take place after

[1] This office is sometimes asked about teachers' discussion of a ballot question, such as an override, in the classroom. Such activity often engenders controversy and is seen as an indirect attempt to influence parents, even if it is undertaken for educational or information purposes. Since there is no explicit prohibition of this activity under the campaign finance law, questions or concerns about such activity should be directed to local school officials or the Massachusetts Department of Education.

the town meeting. In such circumstances, the mention of the election is clearly secondary to the material's primary purpose of providing information relating to town meeting.

The above examples deal with situations where town meeting precedes the election. In contrast, where an election, instead of following town meeting, precedes the relevant town meeting, OCPF advises that public resources should generally not be used to distribute information to voters until *after* the election. Distribution after the election eliminates any inference that taxpayer funds are being inappropriately used to influence or affect the outcome of the election. See AO-04-02 (relating to the distribution of the report and recommendations of a finance committee with the town meeting warrant).

Material that raises legal concerns under Anderson should be distributed with private funds by entities such as a duly organized ballot question committee or an existing association, corporation or other organization, in accordance with M.G.L. c. 55. Officials unsure about the appropriateness of any material planned for distribution should contact OCPF, which will review it and make a recommendation.

B. Preparation of material by officials; restrictions on distribution

Policy-making officials may act or speak out concerning ballot questions in their official capacity and during work hours if in doing so they are acting within the scope of their official responsibilities. See IB-92-02.

Such responsibilities may include preparing a document for use in responding to public inquiries or taking steps to understand the implications of a ballot question that is within their area of responsibility. An official may therefore produce a document that deals with a ballot question, such as a summary of the effects of the question or an agency's position on the question, as long as such preparation is in accordance with his or her official responsibilities and does not expressly advocate a vote on an upcoming election.

An example of a document that concerns a ballot question but does not pose an immediate problem under Anderson is a report prepared by a school building committee supporting the need for a new facility that will be the subject of a Proposition 2½ debt exclusion. The document would be a public record. It may be provided to those who ask for it, such as a citizen who calls the official seeking more information on the ballot question. Any person or group, at that person or group's expense, in turn may distribute the information to voters without violating the campaign finance law if the person or group complies with the campaign finance law's reporting and disclosure requirements. In addition, information prepared by a governmental entity regarding a ballot question may be posted on a bulletin board at town hall, and it may be made available at a counter or other convenient location for the public. It may also be posted on a governmental website. See AO-01-27, and IB-04-01.

While the preparation of the document is allowable, its distribution by a public entity on a larger scale, beyond those who seek out the document or receive it at official meetings as noted below, would raise concerns under Anderson. Because the document is a public record, however, it may be copied and mailed to residents by a private entity using private funds, such as a parent-teacher organization (PTO), a ballot question committee or a corporation. See IB-92-02.
The entity would, however, have to report the expenditures in accordance with the campaign finance law's requirements.

C. Distribution of information at public meetings or hearings

Governmental resources may be used to produce and distribute, or make available, a reasonable quantity of a summary or other document, e.g., an architect's report on a proposed new school building, at a meeting or hearing of the governmental entity, even if the document advocates a particular vote in an anticipated election or otherwise refers to such an election. In meetings or hearings conducted by a public body, materials prepared by or for the body may be distributed to persons in attendance where such materials are designed to facilitate discussion or where the materials otherwise relate to the agenda of the meeting.[2]

The content of such material is generally not subject to Anderson, even if it references or makes a recommendation concerning an upcoming ballot question, because its primary purpose is to facilitate the meeting. Such unsolicited distribution of the material to a larger audience after a meeting should be avoided.

D. Distribution of notices of public meetings or municipal elections

The campaign finance law does not restrict the distribution of some basic information, such as notice of a public meeting held by a governmental body or a notice regarding an upcoming election.

Public resources may be used to prepare and distribute a brief neutral notice to voters announcing the times and dates of meetings such as the type referred to in the previous section, as well as notices of meetings of governmental bodies. For example, a notice of a selectmen's meeting to discuss the municipal budget and an upcoming override may be distributed at public expense. Such notice should be confined to a simple notice of the meeting and avoid any discussion of the substance or merits of the override. A notice that encourages people to attend so they can "learn why an override is needed" would not comply with this standard.

In addition, public resources may be used to distribute information that simply advises voters of an upcoming vote, such as a notice of the time, date and place of a municipal election. In addition, such information may urge people to vote, and provide information about how to register to vote. Also, such information may include a brief neutral title describing the ballot question, and the text of the ballot question. **Extreme care should be taken to avoid any appearance of advocacy**. For example, the title "school expansion project" would be appropriate. On the other hand, titles which would not be appropriate include "ballot question relating to need for school expansion," or "ballot question addressing school overcrowding problem."

III. Use of government buildings or other public facilities or resources

Notwithstanding the Anderson prohibition, there are limited circumstances in which groups supporting or opposing a ballot question may use public resources. In its decision, the court stated

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[2] Generally, such public documents may not be reproduced using public funds if they are to be distributed at a meeting sponsored or organized by a ballot question committee. The documents could, however, be distributed by an official who has been invited to speak at a meeting of other private groups regarding a ballot question within the scope of the official's area of responsibilities.

that the city's use of publicly funded facilities "would be improper, at least unless each side were given equal representation and access." 376 Mass. at 200.

"Equal access" means that a group supporting or opposing a ballot question, such as a registered ballot question committee, may be allowed to use a room or other space in a public building for a meeting, as a long as a group on the opposing side is given the opportunity, on request, to have a similar meeting, on the same terms and conditions.[3]

"Equal access," if provided, does not mean that proponents or opponents must be invited to attend a particular event or be asked or permitted to speak at an event. See AO-90-02. For example, an opponent of a ballot question who demands an opportunity to speak at a meeting of the committee supporting the question is not entitled to such an opportunity under the equal access rule. The content and agenda of the meeting is set and controlled by the group using the space.

While a political meeting in a public building may be allowable under the campaign finance law, the meeting may not include any fundraising activity. Political fundraising is not allowed in buildings occupied for governmental purposes, such as city and town halls and schools. In addition, as previously noted, public employees who work in those buildings are also prohibited from raising funds for any political purpose. See M.G.L. c. 55, § 13-17 and IB-92-01.

"Equal access" does not mean that a private group may use a room or building which has been used for a meeting by a public body, such as a board of selectmen, within the scope of its official responsibilities, even if the public body endorsed or discussed a ballot question at its meeting and the private group opposes the ballot question. The "equal access" requirement also does not provide individuals or groups any right to speak or be placed on the agenda at a public meeting of a governmental body, such as a board of selectmen or school committee. Nor does it mean that an opponent of a ballot question is entitled to such access to distribute information, after the public body has made ballot question information, prepared within the scope of the entity's responsibilities, available to the public in the building or at the meeting. See AO-01-27.

The equal access requirement generally is not triggered by the use of public facilities by parent teacher organizations (PTOs) for regularly scheduled PTO meetings, even if a meeting is used in part to discuss the merits of a ballot question. The primary purpose of PTOs is not to promote or oppose ballot questions. In short, "equal access" is triggered by the use of governmental resources by private groups organized to influence a ballot question, or when private groups use public resources primarily for that purpose.

In addition to access to buildings or space for meetings, groups may be given the opportunity, if equal access is provided, to distribute non-fundraising flyers regarding a ballot question in public buildings. If each side is provided the same opportunity, proponents and opponents may also be offered access to certain public services, such as mailing labels (AO-88-27), a city council chamber for campaign announcement (AO-89-28), faculty mailboxes in public school to distribute non-fundraising campaign material (AO-04-06), or a public park for a political rally (AO-92-28). In addition, a state or local governmental agency may, as part of a collective bargaining agreement, use public resources to

[3] A municipality may choose, however, to not allow *any* access to meeting space by political committees; such a policy does not violate the campaign finance law as long as it is evenly applied to all groups. In other words, equal access may mean no access by political groups. See AO-04-06.

administer a payroll deduction plan for a public employee PAC, since the use of such resources would be for the purpose of fulfilling the governmental entity's contractual obligation, not primarily to provide a benefit to the PAC. See AO-03-04. A municipality or agency, which provides such a resource, must be reimbursed for any additional out-of-pocket expenses incurred in providing the resource. See AO-03-04.

The campaign finance law does not regulate the extent to which proponents and opponents of a ballot question may have access to cable television resources. Questions relating to such access should be addressed to the Cable Television Division of the Massachusetts Department of Telecommunications and Energy at (617) 305-3580.

IV. Privately-funded political committees and other permissible activities

Government officials, public employees or anyone else who wishes to oppose or promote a ballot question may undertake such activity using private funds, through a ballot question committee or other existing organization.

A separate ballot question committee should first be established with the local election official, in the case of a municipal ballot question, or with OCPF, in the case of a question put to voters on the state ballot. This committee may then be used to raise and expend funds to promote or oppose the ballot question. Public employees may not solicit or receive any contribution on behalf of the committee, although they may make contributions and participate in activities of the committee that do not involve fundraising. A school newsletter prepared using public resources, or a PTO newsletter, if distributed by teachers, should not be used to help support a ballot question committee. For example, it should not announce the formation of a ballot question committee or provide information on how to contact the committee. See AO-00-06.

A group may not solicit or receive contributions to support or oppose a ballot question until it organizes and registers as a ballot question committee. Where two or more persons "pool" their money to support or oppose a question, e.g., to pay for an advertisement, the persons should first register as a ballot question committee. Such groups are subject to all the reporting and disclosure provisions of M.G.L. c. 55.

Groups such as parent-teacher organizations and local teachers' unions, which do not raise funds specifically to influence the vote on a ballot question, may make expenditures from existing funds to support or oppose a ballot question, and may make contributions to a ballot question committee. See IB-88-01 "The Applicability of the Campaign Finance Law to Organizations Other Than Political Committees." Groups making such contributions or expenditures must, however, file a report (OCPF Form M22 or 22) with either the local election official or OCPF to disclose the contributions or expenditures. See IB-90-02.

V. Expenditures of Governmental Resources - Remedies

The treasurer of any city, town or other governmental unit, which has made expenditures or used public resources to influence or affect the vote on any question submitted to the voters, must file a report disclosing such activity. See M.G.L. c. 55, § 22A and M-95-06.

Because of the differing circumstances and severity of instances of the improper use of public resources to influence elections, the final disposition and remedies in such cases may vary. Where the use of public resources is minor or difficult to quantify, or where officials are not aware of the restrictions, OCPF focuses on providing guidance to ensure that the action is not repeated.

In other cases, however, restitution of funds adjudicated to have been spent contrary to law may be required. Such restitution may not be paid from public funds. It may, however, be paid by a ballot question committee, association or other private group or individual. Any officer of a governmental unit violating § 22A may be subject to criminal penalties.

Finally, any ten persons may file suit to restrain illegal use of public funds at the local level by filing a ten taxpayer suit. See M.G.L. c. 40, § 53. It was such a "ten taxpayer" suit that led to the Anderson decision. At the state level, any 24 taxpayers can file a similar suit. See M.G.L. c. 29, § 63.

VI. Other Bulletins and Memoranda

This bulletin provides general guidance. If you are in doubt regarding the scope of the campaign finance law, you should contact OCPF at (800) 462-OCPF or (617) 727-8352. This office's web site, *www.mass.gov/ocpf*, provides additional guidance on this and other campaign finance topics. In addition, related interpretive bulletins and memoranda which may be of interest -- and which may downloaded from OCPF's website -- include: IB-90-02 (Disclosure and Reporting of Contributions and Expenditures Related to Ballot Questions); IB-92-01 (The Application of the Campaign Finance Laws to Public Employees and Political Solicitation); IB-92-02 (Activities of Public Officials in Support of or Opposition to Ballot Questions); IB-95-02 (Political Activity of Ballot Question Committees and Civic Organizations' Involvement in Ballot Question Campaigns); IB-95-03 (Use of Public Resources by Elected Officials to Communicate with Constituents or Respond to Criticism); M-95-06 (Disclosure of expenditures of public resources required under M.G.L. c. 55, § 22A); and IB-04-01 (Use of the Internet and E-mail for Political Campaign Purposes).

Michael J. Sullivan
Director

STATE ETHICS COMMISSION

COMMISSION ADVISORY NO. 84-01

POLITICAL ACTIVITY

INTRODUCTION

The purpose of this Advisory (1) is to explain to public employees (i.e., all current officers and employees of Massachusetts state, county, and municipal government agencies, elected and appointed, full-time and part-time, paid and unpaid) how the conflict of interest law applies to their political activities. The term "political activity" includes, but is not necessarily limited to, any activity that is in support of or opposition to a federal, state or local candidate or political party or a state or local ballot question.

In most cases, public employees are free to engage in political activities on their own time as individuals, subject to the limitations discussed in this Advisory (including the campaign finance law's, G.L. c. 55, prohibition against political fundraising in public buildings and by appointed, compensated public employees). Nothing in the conflict of interest law prohibits a public employee from running for any public office, including seeking re-election.(2) The conflict of interest law does not require a candidate to take a leave of absence from his or her public job, but the employee's own agency may require such a leave or establish other limitations stricter than those of the conflict of interest law. If a public employee is elected to another public office, certain restrictions (not discussed in this Advisory) may apply to holding both jobs at the same time; the Commission's Legal Division can provide advice about multiple office holding.

Conversely, public employees may not engage in political activities on public time. Public resources and the tax dollars that fund such resources are to be used for governmental purposes; not for political activity. Public resources include paid staff time, facilities, supplies and equipment.

For the first three subjects discussed in this Advisory (campaign use of public resources, campaigning on the job, and solicitation and fundraising), the campaign finance law often, but not always, establishes stricter requirements than the conflict of interest law. The state Office of Campaign and Political Finance (OCPF) administers and enforces the state campaign finance law, and can provide complete advice about its interpretation (see Appendix B). At times, these two laws have overlapping jurisdiction. In such cases, public employees must comply with both laws.

Section 23 of the conflict of interest law contains prohibitions that apply to all public employees in the Commonwealth. Two of those prohibitions provide that public employees may not, knowingly or with reason to know:

- use or attempt to use their official position to secure unwarranted privileges or exemptions of substantial value for themselves or others (§23(b)(2)); or

- act in a manner that would cause a reasonable person to conclude that any person can improperly influence or unduly enjoy their favor in the performance of their official duties, or that they are likely to act or fail to act as a result of kinship, rank, position or influence of any party or person. Importantly the law also provides that it is unreasonable to so conclude if the public employee has disclosed in writing to his or her appointing authority or, if no appointing authority exists, as is the case for elected officials, discloses in a manner that is public in nature, the facts that would otherwise lead to such a conclusion. (§23(b)(3))

SUMMARY

As explained in detail below, the Massachusetts conflict of interest law[3] prohibits all public employees, whether compensated or not, from:

- using any public resources including staff, facilities, or the state seal or coat of arms, for campaign purposes
- engaging in any political activities during their normal public working hours
- using their authority to solicit campaign contributions or services, or anything else of substantial value from subordinate employees, vendors they oversee, or anyone within their regulatory jurisdiction
- representing a campaign (or anyone else) in connection with some matter in which the employee's own level of government (state or local) has a direct and substantial interest (unless they are "special" employees)

In considering whether an activity is an appropriate governmental activity or an activity that is a predominantly political activity, answers to the following questions may be helpful:

- Is the activity reasonably related to or in support of the official's statutory duties?
- Is the political activity incidental to the governmental activity in a way that involves minimal or inadvertent overlap?
- Is the expense to the government created by the political activity *de minimus*?[4]

Determining whether an activity is predominantly political or governmental depends on the particular facts of each case. The Commission recognizes that this determination can be difficult. Whenever there is a question whether an activity is political or governmental in nature, public employees should seek prospective advice from the Commission regarding such an activity.

I. CAMPAIGN USE OF PUBLIC RESOURCES

The use of public resources of substantial value ($50 or more), available by virtue of one's public employment, for the purpose of conducting, supporting or opposing a candidate or otherwise engaging in a political activity is the use of one's official position to secure an unwarranted privilege for oneself or another.[5] These resources include staff time, publicly provided stationery, office supplies, utilities, telephones, office equipment (e.g. copying machines, typewriters, word processors, fax machines, e-mail), office space or other facilities.[6] These are intended for the conduct of public business, not for conducting political activity or otherwise advancing the political interests of public employees. Thus, political activity that is not in furtherance of the purpose for which government funds were appropriated

is prohibited. Elected officials should take appropriate steps to keep separate official and political activities and to ensure that political and campaign activities take place outside of their public offices.

The Commission recognizes that, in limited circumstances, the use of public resources may be incidental to the officially related duties of a public official, for example, when the public official's staff needs to coordinate with the official's campaign scheduler. In such instances, staff time should be limited as much as is practicable. In circumstances where the use of public resources becomes more than incidental, the matter should be referred to the campaign. For example, if a series of questions to or an interview of a public press officer by a member of the media becomes predominantly focused on a political campaign, the press officer should conclude the interview by referring the media representative to the campaign for further discussion. A public employee or his or her staff should not engage in proactive political activity using public resources. For example, state employees who are required to be with elected officials at a political event, e.g., for security purposes, may not perform political activities such as distributing campaign materials at a political event. In addition, public resources may not be utilized to:

- write political or campaign speeches;
- set up or hold a press conference or press availability the predominant purpose of which is to endorse, promote or oppose a federal, state, county or municipal candidate;
- conduct campaign polls or to answer campaign questions;
- create databases of potential campaign supporters;
- conduct campaign research or photocopying for such purposes;
- create or maintain a campaign website or even create a link from a governmental website to a campaign website.(7)

Moreover, the Commission has ruled that candidates who are public officials or employees may not use the state seal (or state "coat of arms") even on privately purchased stationery, for fundraising or other campaign purposes. The seal may be used solely for official state purposes, not for the private purpose of a campaign.

Finally, if a policy, rule or regulation prohibits the use of a public facility or public resources, such a use would be an unwarranted privilege. For example, the Bureau of State Office Buildings manages the state office buildings located at the Government Center Complex in Boston including the State House, John W. McCormack, Charles F. Hurley and Erich Lindemann Buildings as well as one in Pittsfield and one in Springfield. The Bureau's policy manual states, "Activities in support of political candidates or ballot questions are not permitted on Bureau grounds."

II. CAMPAIGNING ON THE JOB

Public employees may not engage in political activities during their normal working hours. While employed by the taxpayers, they are to be doing the taxpayers' work, and not politicking for themselves or individual candidates, or in support of or opposition to election ballot questions. For appointed public employees, normal working hours are those set by the employer through regulations or otherwise, or as designated in the applicable collective bargaining agreement. Where such hours have not been clearly defined, the employee is responsible for resolving any ambiguity with his or her appointing official before engaging in political work.

III. SOLICITATION AND FUNDRAISING

The conflict of interest law forbids public employees from soliciting anything of substantial value from

those they oversee, because of the "inherently coercive" nature of such solicitations. The Commission has applied this principle to political campaigns. Thus, public employees may not solicit campaign assistance from persons they regulate or who are under their supervision. For example, they may not use their official title or authority, or their presence at a meeting under coercive circumstances, to solicit non-monetary campaign assistance. They may also not solicit private, paid business relationships with such persons they oversee (including, for example, the provision of paid political consulting services).

If persons under the public employee's jurisdiction wish to enter into such a private business relationship with the public employee, the public employee must publicly disclose in writing the existence of the private business relationship, and the facts that the person under his jurisdiction initiated it and entered into it entirely voluntarily.

The same principle applies to campaign fundraising. Thus, appointed public employees (whether compensated or not) may not solicit political contributions from other public employees whom they supervise, vendors that they oversee, or anyone over whom they may have regulatory power. The Commission has not addressed whether this prohibition applies to elected officials except in situations where there has been an express or implied link between the making of a contribution and a subordinate's appointment or employment..[8] In addition, sections 2 and 3 of G.L. c. 268A prohibit both appointed and elected public officials from soliciting or accepting campaign contributions or political services in return for being influenced in their official acts. In re Nolan, 1989 SEC 415. See Commonwealth v. Borans, 379 Mass. 117, 142 (1979). See also G.L. c. 55, §§16-17; c. 56, §§33-36 (criminal statutes not enforced by Commission).

It should be noted again that the most significant restrictions on campaign fundraising by Massachusetts public employees are not enforced by the State Ethics Commission; they are found in the state campaign finance law which is administered by OCPF. Among other things, these restrictions prohibit public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone; prohibit anyone from giving, soliciting, or receiving political funds in any public building; and forbid requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF.

IV. REPRESENTING CAMPAIGNS IN DEALINGS WITH THE GOVERNMENT

The conflict of interest law (G.L. c. 268A, §§4, 11, 17) also prohibits an appointed or elected public employee from acting as agent or attorney for, or receiving compensation from, anyone other than the government in connection with a particular matter in which the same level of government (state, county, or municipal) is a party or has a direct and substantial interest. Both the state and municipalities have a direct and substantial interest in some election-related matters, including the regulation of campaign finances and the conduct of elections. Thus, a full-time state or municipal employee may not represent a campaign (or anyone else) in dealings with the same level of government. For example, a full-time municipal employee (other than a candidate who must by law sign campaign finance reports) could not sign a municipal campaign finance report, to be filed with the town clerk;[9] nor could the employee be paid to help prepare the report, even if he did not sign or deliver it. A full-time state employee could not act as a candidate's lawyer (even on her own time and without a fee) before the State Ballot Law Commission; nor could the employee be paid to review signatures on nomination papers in preparation for such an objection proceeding, even if she never appeared before the state Commission.

This prohibition is much narrower in scope for part-time or unpaid public employees who are "special" employees.[10] Since the prohibition applies only to representation in connection with matters relating to a "special" employee's own agency, it will prohibit such election-related representation only if the

"special" employee is employed by the election agency itself.

APPENDIX A. CAMPAIGN ACTIVITIES BY ELECTION OFFICIALS

"Election officials" are the public employees who actually conduct elections; they include the Secretary of State and the Secretary's election staff, State Ballot Law Commissioners, and at the municipal level, city and town clerks, election commissioners, registrars, and their full-time and part-time staffs, including the election officers who staff the polls on election day. In addition to establishing the general restrictions above that apply to all public employees,(11) the conflict of interest law applies to these election officials in other ways.(12)

First, candidates for compensated offices have a financial interest in their own election. Therefore, §§6 and 19 of the conflict of interest law ordinarily(13) prohibit election officials from participating in decisions that can affect the outcome of an election at which a candidate for a compensated office is the official himself or herself, or the official's immediate family member(14) or business partner; or in which a political committee for which the official is an officer or a paid employee has an interest; or in which the official otherwise has a financial interest in the outcome. Examples of these decisions (which the conflict of interest law calls "particular matters") are decisions about counting votes or absentee ballots, about eligibility to vote or to register, and about certifying, filing, and objecting to nomination papers and ballot question petitions. Participation includes not only making the decision, but discussing or advising about it.

If an election official is unable to participate, the election laws often provide for a substitute.(15) For example, an elected Town Clerk who is a candidate for re-election may not participate in decisions that may affect his or her own election. Other officials are available to make these decisions (depending on the decision, an assistant or temporary clerk, other registrars, or election officers).

Second, G.L. c. 268A, §23(b)(2) (discussed in the Introduction above) prohibits election officials from using their official positions to secure an unwarranted privilege for a candidate or anyone else. Thus, while this section does not prohibit election officials who have publicly supported a candidate (or a position on a ballot question) from participating in official election-related decisions, they must base such decisions solely on the merits, using the same objective standards they would apply to all similar decisions. These objective standards are found, for example, in the election statutes, relevant case law, and regulations of the Secretary of State. Furthermore, §23(b)(3) requires election officials who have actively participated in campaigns or publicly supported a candidate (or a position on a ballot question) to make a public, written disclosure(16) of these facts before they participate in any decision that can affect the outcome of the relevant election.

Finally, §23(e) allows election officials' supervisors to establish and enforce additional requirements. A May 1990 advisory from the State Secretary's Elections Division, for example, advises that "in most cases, election officials should choose between publicly displaying support for a candidate (or a position on a ballot question) and participating in official decisions that may affect that candidate (or ballot question)." In this connection, the Secretary's advisory notes that some city and town clerks have prohibited election officers from displaying political buttons and bumper stickers even on their "off" hours, although this policy is not required by the state conflict of interest or election laws.

APPENDIX B. OTHER AGENCIES

The State Ethics Commission can give advice only about the state conflict of interest law. Other state

and federal laws regulate the political activities of Massachusetts public employees; they are administered by the agencies listed below. Furthermore, individual public agencies may place additional limitations on the political activities of their employees. Public employees should determine what restrictions apply to them in their own public jobs.

For more information about these other laws and related subjects, contact:

- for state campaign finance law (G.L. c. 55):

  Office of Campaign and Political Finance (www.mass.gov/ocpf)
  One Ashburton Place, Room 411
  Boston, MA 02108
  (617) 727-8352 or 1-800-462-OCPF

- for campaign finance law for federal office only:

  Federal Election Commission (www.fec.gov)
  999 E Street, N.W.
  Washington, DC 20463
  1-800-424-9530

- for federal Hatch Act (applies to state and local employees paid at least partly from federal funds):

  Hatch Act Unit (www.osc.gov/hatchact.htm)
  U.S. Office of Special Counsel 1730 M Street, N.W., Suite 201
  Washington, D.C. 20036-4505
  1-800-85-HATCH or 1-800-854-2824
  1-202-653-7143

- for state laws about election procedures (G.L. c. 50-54):

  Elections Division (www.mass.gov/sec/ele/eleidx.htm)
  Office of the Secretary of State
  One Ashburton Place, Room 1705
  Boston, MA 02108
  (617) 727-2828 or 1-800-462-VOTE

For more information about the state conflict of interest and financial disclosure laws (G.L. cc. 268A & 268B), including the subjects discussed in this Advisory, please contact:

Legal Division
State Ethics Commission (www.mass.gov/ethics)
One Ashburton Place, Room 619
Boston, MA 02108
(617) 371-9500

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ENDNOTES

1. The Commission issues Advisories periodically to interpret various provision of the conflict of interest law. Advisories respond to issues that may arise in the context of a particular advisory opinion or enforcement action but which have the potential for broad application. It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their agency counsel or the Legal Division of the State Ethics Commission at (617) 371-9500. Copies of all Advisories are available from the Commission office or online at online at www.mass.gov/ethics.

2. The federal Hatch Act applies to state and local employees who are principally employed in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency. In some instances, the Hatch Act may prohibit such employees from becoming candidates for public office in a partisan election; using official authority or influence to interfere with or affect the results of an election or nomination or directly or indirectly coercing contributions from subordinates in support of a political party or candidate (see Appendix B).

3. In addition, as explained below, the state campaign finance law sometimes establishes stricter requirements. Among other things, it prohibits public employees who are both appointed and compensated from directly or indirectly soliciting or receiving any political funds from anyone; prohibits anyone from giving, soliciting, or receiving political funds in any public building; and forbids requiring any public employee to contribute any political funds or to render any political service. For complete details, contact OCPF (see Appendix B).

4. The Commission has ruled that anything with a monetary value of less than $50 is not of substantial value

5. Although the State Ethics Commission has reached the conclusions in parts I and II under the state conflict of interest law, G.L. c. 268A, § 23(b)(2), OCPF has reached similar conclusions under the state campaign finance law as interpreted by a state Supreme Judicial Court decision, Anderson v. City of Boston, 376 Mass. 178 (1978), appeal dismissed, 439 U.S. 1069 (1979). For complete details, contact OCPF. Note that the campaign finance law and Anderson prohibit campaign use of public resources even if they are not of "substantial value."

6. Public facilities that are in fact available to the general public for use may be available for conducting certain political activities in accordance with the terms and conditions of the facility and on an equitable basis.

7. In Interpretive Bulletin 95-03, the Office of Campaign and Political Finance concluded, "An elected official or the official's staff may use public resources to produce and distribute information to constituents regarding the official's position on issues if the activity is consistent with the official's responsibilities. Elected officials and their staff may also use public resources to respond to criticism of the official's record, even from opponents, provided such use is reasonable and proportionate in scope. Public resources may not be used to attach the candidacy of an opponent.

8. See advisory opinion EC-COI-92-12, footnote 10, Public Enforcement Letter 95-2 (sheriff violated G.L. c. 268A, § 23(b)(2) by combining official swearing-in ceremonies for deputy sheriffs with political campaign fundraising events) and In the Matter of Michael Bencal, 2006 SEC ___, (city councillor violated the same section by soliciting a contribution from municipal employee to assure his continued employment).

9. OCPF has interpreted the campaign finance law to prohibit an appointed, compensated public employee from being a treasurer for a candidate or a political committee.

10. A "special state employee" is an appointed state employee who is unpaid, or is allowed by the state agency to do personal or private work during normal working hours (and the agency classification or permission is filed with the State Ethics Commission), or in fact earns compensation for no more than 800 hours during the preceding 365 days. G.L. c. 268A, § 1(o).

A "special municipal employee" is an elected or appointed municipal employee (except a mayor, alderman, councillor, or a selectman in a town of more than 10,000 population) who meets the same requirements (except for disclosure to this Commission) and holds a position so designated by vote of the City Council or Selectmen. Id. § 1(n).

11. Note that G.L. c. 268A, § § 4, 17 (discussed in part IV above) prohibit even election officials who are "special"

employees from representing anyone in dealings with their own election agency. However, designating part-time municipal election officials, such as registrars, assistant registrars, and election officers, as "special municipal employees" is important for another reason. If they are not so designated, G.L. c. 268A, § 20 will prohibit full-time paid municipal employees from serving as election officials. Regular full-time, municipal employees may hold a part-time election official position if: (1) their election official positions are filled after public notice, (2) they make public written disclosure to the City or Town Clerk of their salaries in both jobs, (3) their election supervisor files with the Clerk a written certificate that no regular employee of the supervisor's office is available, and (4) the City Council or Selectmen vote to exempt them by name. See G.L. c. 268A, § 20(b). Part-time municipal employees holding positions designated as specials may also hold a part-time election official position also designated as 'special' if they make an appropriate disclosure. See G.L. C. 268A, § 20(c). If they are already part-time election officials in another capacity, they may also need approval from the City Council or Board of Selectmen. See G.L. c. 268A, § 20 (d).

12. Note that G.L. cc. 50-54, which govern election procedures may have additional restrictions. Election officials should seek guidance from the Office of the Secretary of State about such restrictions.

13. An election official may participate nevertheless if an appointed official's appointing authority determines in writing beforehand that the financial interest was not so substantial as to interfere with the integrity of the official's services (for state officials, this determination and the official's written disclosure must be filed with the Commission).

14. An official's "immediate family" is the official and his or her spouse, and their parents, children, brothers and sisters.

15. For example, the first deputy Secretary would substitute for the Secretary of State (G.L. c. 9, § 3). An assistant clerk, or a temporary clerk appointed by the Mayor or Selectmen, would substitute for the City or Town Clerk (G.L. c. 41, § § 14, 18, 19). A temporary registrar or election commissioner could similarly be appointed (G.L. c. 51, § 20).

16.Appointed election official make this disclosure to their appointing authority. The Secretary makes it to the State Ethics Commission. An elected town clerk posts it in his or her own office.

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