

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

Tom Slockett, Appellant,)	Appeal No. 12ECDB001
)	
v.)	
)	
Iowa Ethics and Campaign Disclosure Board,)	Ruling on Motion for Summary
Respondent.)	Judgment
)	

STATEMENT OF THE CASE

On June 29, 2012, appellant Tom Slockett filed an appeal from a decision by the Iowa Ethics and Campaign Disclosure Board (the board). On November 9, 2012, appellant filed a motion for summary judgment. The board transmitted the case to the Administrative Hearings Division of the Department of Inspections and Appeals for disposition of the motion.

On November 30, 2012, per a stipulated scheduling order, the board filed a resistance to appellant's motion for summary judgment. On December 18, 2012, appellant filed a supplemental request for relief and a reply to the resistance. The supplemental request for relief included attachments that were considered part of the record, including the board's reprimand, the complaint that led to the investigation, and newspaper articles.

On February 20, 2013, the parties appeared at the Wallace State Office Building to present oral argument. Randall Wilson represented appellant. Megan Tooker represented the board. The matter was deemed submitted upon the close of argument.

FINDINGS OF FACT

Appellant Tom Slockett had been the Johnson County Auditor since 1977. As of April of 2012, he faced a primary contest to retain office. The primary was set for June 5, 2012. The primary was highly contested, with two legislators from the same political party voicing public support for appellant's opponent. (Newspaper articles).

On April 25, 2012, the board received a complaint alleging that appellant used public resources to support his re-election campaign. More specifically, the complaint alleged that appellant:

- (1) sent an email from his county email address to his office staff that referenced his opponent;
- (2) circulated his nomination petition among the Auditor's office staff during working hours, and confronted those that did not sign the petition;
- (3) changed longstanding office policy that voter records had to be obtained in person with a signature in order to accommodate a friend's telephone request for information; and
- (4) made numerous campaign-related phone calls during the week of April 16, 2012, while he was in the Auditor's office. (Complaint, newspaper articles).

On April 27, 2012, the board determined that the complaint was legally sufficient and ordered its staff to conduct an expedited investigation. On May 31, 2012, the board issued a written reprimand. The board analyzed each allegation under Iowa Code section 68A.505. It did not find the first three allegations constituted violations of section 68A.505.¹ However, it found a violation regarding the fourth allegation. The board found that appellant made campaign calls while working in his government office. While he used his personal cell phone and not his office phone, the board held that the use of his office constituted a use of government resources. The board imposed the lowest level of sanction – a reprimand – in part because appellant relied on advice from the current and former county attorney that it was not a violation to make calls with his personal cell phone. (Reprimand).

Appellant made several arguments in his motion. First he argued that a county auditor is not a “governing body” within the meaning of section 68A.505. Second, he argued that the incidental use of a public building is not an “expenditure of public moneys for political purposes,” as used in the statute. Third, he claimed that the board's interpretation of the statute would constitute a violation of the free speech provisions of the first amendment. Finally, appellant argued that the board's administrative rule 351 – 5.1 violates that first amendment both facially and as applied in this case. Appellant's constitutional claims will not be considered at this level, but are preserved for judicial review.²

1 The board expressed concern that the second allegation violated Iowa Code section 68B.2A, but found that it did not have jurisdiction to find a violation. The board referred the matter to the Johnson County Attorney for further consideration.

2 A litigant in a contested case must raise constitutional issues in the administrative proceeding to preserve them for later review. *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429 (Iowa 1987).

The Board resists the motion on all grounds. The board asserts that there are material facts in dispute regarding the interpretation of Iowa Code section 68A.505, and seeks to the opportunity to develop the factual record further in this case. The board also challenged each of the legal grounds raised by appellant.

CONCLUSIONS OF LAW

Summary judgment standard: Summary judgment is available in contested case proceedings before the department.³ Judgment shall be entered if the pleadings, submitted discovery, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The purpose of summary judgment is to avoid useless trials when the case can be decided as a legal matter.⁴

The party moving for summary judgment must meet the following burden:

In ruling on a summary judgment motion, the court must look at the facts in a light most favorable to the party resisting the motion. The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. An inference is legitimate if it is “rational, reasonable, and otherwise permissible under the governing substantive law.” On the other hand, an inference is not legitimate if it is “based upon speculation or conjecture.” If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. (cites omitted).⁵

Summary judgment is not a paper trial.⁶ The court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe. In a motion for summary judgment the court has but one task – to decide, based on the evidence of record as identified in the parties' moving and resistance papers, whether there is any material dispute of fact that requires a trial.

The board argued that summary judgment should not be granted because there are genuine issues of fact. However, the board's argument is based on its claim that it conducted an expedited investigation in light of the impending primary election, so it did

3 701 IAC 7.50(4)(3).

4 *Sorenson v. Shaklee Corp.*, 461 N.W.2d 324, 326 (Iowa 1990).

5 *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717-718 (Iowa 2001).

6 *Walker v. Fred Nesbit Distributing Co.* 331 F.Supp.2d 780, 784 (S.D. Iowa 2004).

not have sufficient time to subpoena records to substantiate some of the allegations. The board does not claim any dispute in fact as to the violation found in its May 31, 2012 reprimand decision – rather, it seeks to reopen its investigation to allow an opportunity to expand its findings.

The board’s claim is not a sufficient ground to deny summary judgment. The board made a decision to conduct an expedited investigation so it could issue a decision prior to the primary election. The other option was to open a full investigation, even though it may not have been complete before the primary. There are pros and cons to each approach, and the board decided it best to issue a decision before the election. Appellant challenged the decision issued by the board, and the board is bound to defend that decision. Because the board’s decision is based on undisputed facts, summary judgment is an appropriate means to decide the claim.

Statutory and regulatory framework: The board was created as an independent agency to administer the statute governing ethics and lobbying.⁷ The board is responsible to set standards for, and monitor the ethics of officials, employees, lobbyists, and candidates for office in the executive branch of state government. The board is also responsible to set standards for, investigate complaints relating to, and monitor the campaign finance practices of any candidate for “public office.” The code defines “public office” as “any state, county, city, or school office filled by election.”⁸ Section 68B.32(1) is limited to the administration of “this chapter,” thus meaning chapter 68B. However, section 68B.32A(1), which delineates the board’s duties, requires the board to adopt rules and conduct hearings as necessary to carry out the purposes of chapter 68A as well.

The board found appellant committed a violation of Iowa Code section 68A.505, which states:

The state and the governing body of a county, city, or other political subdivision of the state shall not expend or permit the expenditure of public moneys for political purposes, including expressly advocating the passage or defeat of a ballot issue.

This section shall not be construed to limit the freedom of speech of officials or employees of the state or of officials or employees of a governing body of a county, city, or other political subdivision of the state.

⁷ Iowa Code section 68B.32(1).

⁸ Iowa Code section 68A.102(20) (defining “public office”).

This section also shall not be construed to prohibit the state or a governing body of a political subdivision of the state from expressing an opinion on a ballot issue through the passage of a resolution or proclamation.

The board has adopted an administrative rule requiring a broad interpretation of the “expenditure of public moneys for political purposes.” The rule states:

Iowa Code section 68A.505 prohibits the expenditure of public moneys for political purposes, including expressly advocating the passage or defeat of a ballot issue. For the purposes of this chapter, the board will construe the phrase “expenditure of public moneys for political purposes” broadly to include the use of public resources generally. This chapter outlines the permissible and impermissible uses of public resources for a political purpose pursuant to Iowa Code section 68A.505 and board interpretations of the statute.⁹

In turn, the board rules define a “political purpose” to include advocacy for the “nomination, election, or defeat of a candidate[.]”¹⁰ A “candidate” is defined to include any individual who has taken action to seek nomination or election to a state or local office in Iowa. The rules further outline specific examples that will constitute the use of public resources for political purposes, including using publicly owned motor vehicles to transport political materials or travel to campaign-related events, using public resources to produce and distribute communications that advocate for or against candidates, and placing campaign materials on public property.¹¹

Is the office of county auditor a “governing body?” Appellant first argued that a county auditor is not a “governing body,” as that term is used in section 68A.505. The legislature did not define “governing body” in chapters 68A or 68B, and the term is not defined by the board’s rules. Therefore, traditional rules of statutory construction must be employed.

The polestar of statutory interpretation is to put into effect the intent of the legislature, as primarily ascertained by the language used in the statute.¹² If the language of the statute

9 351 IAC 5.1.

10 351 IAC 5.3.

11 351 IAC 5.4(2).

12 *University of Iowa v. Dunbar*, 590 N.W.2d 510, 511 (Iowa 1999).

is unambiguous, there is no need to apply any other rules of statutory interpretation.¹³ The courts consider “the objects sought to be accomplished and the evils and mischiefs sought to be remedied, seeking a result that will advance, rather than defeat, the statute's purpose.”¹⁴ The courts interpret statutory provisions to presume that separate provisions are not redundant and to give each provision meaning.¹⁵

The focus of section 68A.505 is preventing the use of public funds to advocate the passage or defeat of a ballot issue. There is no other specific conduct that is referenced in the first unnumbered paragraph of the section. The second unnumbered paragraph of the section also specifically refers to ballot issues, stating that the state or a governing body of a political subdivision may pass a resolution or proclamation that expresses an opinion on a ballot issue. The focus on ballot issues lends to an interpretation that the objective of the statute was to prevent governing bodies of political subdivisions from using public funds to support or oppose ballot issues, as opposed to the broader interpretation as applied by the board.

This interpretation is supported by the history underlying the statute. The statute was first adopted in 1991 at a time when there was litigation and other debate about the ability of political subdivisions to use public funds to support or oppose ballot issues. At the same time the legislature considered the adoption of the statute, the Iowa Supreme Court was considering a case whether a school board improperly authorized public funds to retain a consulting firm to perform a facilities assessment prior to a bond issue.¹⁶ The decision was issued on June 19, 1991, but the case was pending while the legislature considered the same issue. During that same year, the Attorney General issued an opinion to Kay Williams, the Executive Director of the Campaign Finance Disclosure Commission, on a similar question regarding use of funds to advocate on ballot issues. The opinion was issued after the legislation had taken effect, but Ms. Williams sought advice regarding whether a political subdivision could legally use public funds to support a ballot issue prior to the effective date of the statute. The opinion also stated that a prior opinion request had been denied, thus showing the issue was raised more than once during 1991. This history shows a public concern focused specifically on the question whether public funds could be used to support or oppose ballot issues, as opposed to a wide-range of conduct.

¹³ *Carolán v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996).

¹⁴ *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999).

¹⁵ *In Interest of GJA*, 547 N.W.2d 3, 6 (Iowa 1996).

¹⁶ 471 N.W.2d 815 (Iowa 1991).

Section 68A.505 was directly responsive to those concerns. The statute clearly prohibits the governing body of county, city, or school district from using public funds to advocate for a ballot issue or referendum that the governing body supports. The statute allows the governing body to issue a resolution or proclamation, which allows the governing body to let the public know of its position on the ballot issue. The governing body simply cannot use public moneys to otherwise promote its position. Because the expenditure of public funds must be authorized by the political subdivision's governing body, there was no reason for the statute to reference other government officials or employees.

In contrast, the legislature had long-prohibited the type of conduct that the board claims is covered by section 68A.505 in other statutory provisions. For instance, section 721.2(8) prohibits a person from using property owned by the state or a subdivision to operate a political phone bank to poll voters, solicit funds, or urge support of a candidate or ballot measure. Section 721.4 prohibits a person from using a motor vehicle owned by the state or a political subdivision to transport political literature or a person engaged in a political campaign. Section 721.5 prohibits state employees (although not employees of political subdivisions) from leaving the place of employment or duties of office for the purpose of soliciting votes or engaging in campaign work during the hours of employment. The difference between the chapter 721 provisions and section 68A.505 is notable, because the chapter 721 prohibitions are directly related to personal campaigns, whereas section 68A.505 focuses on public ballot campaigns.

It is logical for section 68A.505 to be limited to the ultimate governing body of a political subdivision, because that body must authorize (or at least oversee) the use of government funds. In the context of another statute, the Iowa Supreme Court adopted a definition of the governing body of a city to include both the mayor and city council of the city, but not other actors.¹⁷ Appellant cited to the dissent of the same decision in arguing that "governing body" should be interpreted even more strictly to only include the city council, which was the body that performed the "legislative functions" of the city.¹⁸ However, even under the majority's decision, the term should be confined to the body that is legally empowered to authorize actions by the county, city, or political subdivision.

A county auditor is not a "governing body" under this definition. The power of a county is vested in the board of supervisors, and the duty of a county shall be performed by or

¹⁷ See *Polk County Board of Supervisors v. Polk County Charter Commission*, 522 N.W.2d 783, 792-93 (Iowa 1994).

¹⁸ *Id.* at 796 (Carter, J., dissenting).

under the direction of the board of supervisors except as otherwise provided by law.¹⁹ The county auditor, on the other hand, has prescribed duties separate and subsidiary to the board of supervisors.²⁰ Among the auditor's duties is to serve as the clerk to the board, including recording the board's proceedings, maintaining books and records, and signing orders for payment of money.²¹ Unlike the position of mayor, as debated in the *Polk County* decision, there is no question that the board of supervisors acts as the governing body of a county, and the county auditor performs other duties as set forth by statute.

For these reasons, the board's decision must be reversed. Appellant was the Johnson County Auditor, and not the governing body for the county. His actions may have violated some other provision of law, but his actions are not prohibited by section 69A.505 because he was not the governing body of the county.

Expenditure of public moneys: I would also reverse for failure to show an expenditure of public moneys as prohibited by the statute. Appellant did not expend public moneys for a ballot issue or other similar purpose. However, even if the board's more broadly written rules were used, I could not affirm the decision because the undisputed facts do not show an expenditure of public moneys.

The board's rules govern a wide range of conduct, including using publicly owned motor vehicles to transport political materials or travel to campaign-related events, using public resources to produce and distribute communications that advocate for or against candidates, and placing campaign materials on public property. However, there is no evidence to show that appellant violated any of those specific provisions. There is no evidence that he used office phones, computers, copiers, vehicles, or any other public property to further his campaign. The record only allows that he used a personal cell phone from his public office building. The board conceded that appellant would not have violated the statute if he had made the same call from outside his office, whether across the street or in his personal vehicle. The fact that he made calls on his personal cell phone while in the office building does not mean he expended public resources for political purposes, because he did not use the building for any campaign purpose. The building itself was incidental to his actions, because he could have been anywhere when he made his campaign calls on his phone.

19 Iowa Code section 331.301(2).

20 See Iowa Code section 331.502.

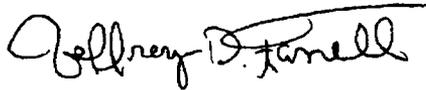
21 Iowa Code section 331.504.

This finding is not to condone appellant's actions, which were clearly causing dissention within his office. The undisputed facts in the reprimand give the impression of a long-time politician that was doing more to try to keep his job than do his job. The board might have found additional facts if it had taken more time with its investigation, but it sought to issue a decision on the complaint prior to the election. Still, the board cannot find a violation that reaches beyond the terms of the statute and its regulations. Appellant may have violated some provision of law, but he did not violate Iowa Code section 68A.505.

ORDER

The reprimand issued by the Iowa Ethics and Campaign Disclosure Board against Tom Slockett, former Johnson County Auditor, is hereby reversed for failure to show a violation of Iowa Code section 68A.505. The board shall take any action necessary to implement this decision.

Issued on April 1, 2013.



Jeffrey D. Farrell
Administrative Law Judge

cc: Attorney – Megan Tooker
Attorney – Randall Wilson