IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TOM SLOCKETT,
Petitioner,

vs.

IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD,
Respondent.

Civil Case No. CVCV 049899

Appellant's Brief Resisting Board's Exceptions

C O N T E N T S

I. Statement of the Case

For purposes of this argument the following facts and record as recited by the Order of Reprimand in this case are assumed to be true:

> On this 31st day of May, 2012, a complaint filed against Johnson County Auditor Tom Slockett came before the Iowa Ethics and Campaign Disclosure Board. **The Board elects** to handle this matter by administrative resolution rather than through a contested case proceeding process. See Iowa Admin. Code r. 9.4(2). **For the reasons that follow**, the Board hereby reprimands Tom Slockett for using government resources for political purposes in violation of Iowa Code section 68A.505.
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> 4. Telephone calls
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> Mr. Slockett acknowledged working on his campaign while in the office during week of April 16. He said he made telephone calls using his private cell phone to ask people to publicly support his candidacy. Mr. Slockett said he does not believe he initiated any of these calls using the Auditor's phone line but acknowledged that some of his friends and supporters may have returned his call by calling his work number rather than his cell number.
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> Mr. Slockett said he was relying on the advice of both the current and former Johnson County Attorneys when he was making these telephone calls while in the office. Both Attorneys acknowledged they have advised county officials that it is permissible to use government resources for political purposes as long as there is no additional cost to the county.
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> **The Board finds 68A.505 prohibits the use of government resources, including office facilities and equipment, for political purposes regardless of whether or not the use of these resources incurs an additional cost to the government body.** Mr. Slockett expressly advocated for his candidacy when he telephoned people and asked them to publicly support his re-election bid. Mr. Slockett used government

> resources-his office-when he made those telephone calls, even though most of them were on his private cell phone.
>
> **Nevertheless, the Board finds it is a mitigating factor that Mr. Slockett relied on the advice of counsel when making these telephone calls. Based on past Board precedent, the Board believes a reprimand, the least severe civil sanction, is the appropriate sanction for violating the law in reliance on the advice of counsel.** See 2001 IECDB 12.
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> SUMMARY
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> Mr. Slockett is reprimanded for using government resources for political purposes in violation of Iowa Code section 68A.505.

"*Reprimand*", Case No. 2012 IECDB05, Iowa Ethics and Campaign Disclosure Board (May 31st, 2012) {*Emphasis Supplied*}

At the Board's discretion, the reprimand was issued on May 31st, 2012, just 5 days before the primary election. The Appellant, Mr. Slockett had served as Johnson county auditor since 1977. In the three previous primary elections in which he had an opponent, he more than doubled the votes of his competitors each time. The Board's ethics reprimand has been cited as a likely factor contributing to Slockett's defeat. http://www.kcrg.com/news/local/Weipert-Defeats-Slockett-in-Democratic-Primary-for-Johnson-Co-Auditor-157384535.html.

The Appellant, Tom Slockett elected not to contest any of the Board's fact-finding as set forth above, but he did file a timely appeal and a motion for summary judgment contesting the Board's legal authority to issue the reprimand pursuant to its authority to enforce Iowa Code §68.505. That section, set forth in its entirety, states as follows:

> **68A.505 Use of public moneys for political purposes.**
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> 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. … [*emphasis supplied*]

Mr. Slockett argued that the Board's broad application of its self-admitted "broad construction"[1] of Iowa Code 68A.505, allowed it to consequence his behavior in disregard of his constitutional rights and the express meaning, limitations and intent of the statute. The Board, through its attorney resisted summary judgment and the issues were thoroughly briefed on both sides. To its credit, the Board secured the services of a

[1] Iowa Administrative Code, Ethics and Campaign Disclosure [351], 351—5.1(68A):

> CHAPTER 5
>
> USE OF PUBLIC RESOURCES FOR A POLITICAL PURPOSE
>
> 351—5.1(68A) Scope of chapter.
>
> 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.
>
> This rule is intended to implement Iowa Code section 68A.505.

{*emphasis supplied*}

neutral administrative law judge {"*ALJ*"} to hear the case, thereby avoiding the somewhat awkward position of having to decide an appeal to which it is also a party.[2]

In its legal resistance to the Appellant's motion for summary judgment, the Board sought to reopen its investigation and argued that summary judgment was premature even though it is authorized by the board's own rules.[3] That argument was rejected by the ALJ on grounds that the Board, having made its determinations and having settled upon an administrative remedy, was not entitled to start over from scratch. [*ALJ's Decision*, p. 3-4]:

> 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 fulI 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.

[2] The Iowa Code requires a "separation of functions" within the agency: "an individual who participates in the making of any proposed or final decision in a contested case shall not have personally investigated, prosecuted or advocated in connection with that case…" §17A.17(8)

[3] See, Iowa Admin. r. 351—11.14 (17A, 688).

The ALJ examined the historical evolution of the statute in question. Employing that history, simple logic, and the plain, unambiguous language of the statute itself, the ALJ concluded that it cannot be applied to the Appellant in this case, because he was not a "governing body," and because the undisputed behavior for which he was reprimanded did not involve an "expenditure of public monies" as contemplated in each case by the statute (Iowa Code § 68A.505). The ALJ further found that even under the Board's own more broadly written rule interpreting §68A.505, Mr. Slockett's behavior did not amount to an expenditure of public monies. [*ALJ's Decision*, p. 8] {finding no significant connection between the Appellant's use of his cell phone and the public building from which his calls were placed}.

Following the ALJ's decision, granting summary, the Board's attorney filed exceptions with the Ethics Board seeking to overturn the ALJ's grant of summary judgment as permitted by the Board's own rules. Chief among the exceptions was a renewed request to be allowed to reopen the investigation and, presumably, look for more evidence or even for different violations. The Petitioner resisted the exceptions with further briefing.

The Board did not convene to consider the exceptions until a year later on June 4, 2014. The board did not issue a formal ruling following its deliberations on that occasion. Mr. Slockett requested a written ruling, but was only given an audio recording

regarding the decision of the board that day, and that is only a recording of the open session following closed discussions in which the Petitioner was not allowed to participate.

The following is an accurate written account of the discussion that occurred afterwards in open session:

Chair: "We return to open session.

At this point we will discuss publicly, what we, what we discussed in closed session.

First with respect to the proposed decision of the administrative law judge in the Tom Slockett matter."

"make a motion?"

Unidentified Speaker: "I make a motion that we reject the administrative law judge's decision, and that we set a hearing."

2nd Unidentified Speaker?: [unintelligible blip]

Chair: "We discussed our conclusion that the grant of summary judgment in this matter was inappropriate. We discussed as well our disagreement with the legal analysis of the administrative law judge in his proposed decision. And, for those reasons, we determined that rejection of the proposed decision was be[the?] appropriate. The, so in a sense, that's your motion."

Unidentified Speaker: "Yes"

Chair: "And your second was to that motion to reject the proposed decision."

2nd Unidentified Speaker?: [unintelligible blip]

Chair: "And, and is it also your motion that a new hearing examiner be appointed…"

Unidentified Speaker: "Yes"

Chair: "And that was your second?" "Any further discussion about that?"

Ms. Tooker (counsel for the Board): "I'm, I'm sorry, just for clarification you wanted, you want a new administrative law judge appointed, or a board member?"

Chair: "The discussion was that the [*unintelligible*] and the rules require, the Chair will appoint a hearing officer and I discussed my suggestion that the, that the whole board be appointed to hear the case. There was a discussion in closed session about the significance of this matter to, to the public, people of Iowa, the question of whether this board enforces this particular statute against individual people as well as political entities [or their?] subdivisions, which was the position of the ACLU. In the opinion, opinion of the Board, that these were all very significant issues, and, and, the, [garbled] [entirely?]appropriate for the entire Board to hear the case. So that's…The Chair intends to appoint the entire Board to hear the case given its significance to the, to the people of Iowa. So, it's been moved and seconded, …any further discussion? All those in favor?

Committee: "Aye"'s [Recording ends after "Aye"]

Following the June 4th, 2014 Board meeting, no written ruling or decision was ever issued by the Board with regard to its rejection of Judge Farrell's decision. The Board did not respond to Petitioner's inquiry as to whether there would be such an order. Approximately 20 days later, Mr. Slockett filed a Motion to Stay Further Administrative Proceedings "in order to permit an appeal of the Board's decision denying summary judgment to the Iowa District Court." The motion for stay was resisted the Board's attorney. On or about October 3, 2014 the Board met again in closed session and after returning to open session, the Board voted to overrule the Motion for Stay. Eleven months then passed without any further action by the Board at which point the Petitioner filed this action for administrative review in the Polk County Iowa District Court.

The Iowa "Ethics and Campaign Disclosure Board" is an independent executive agency established by Iowa Code §68B.32. Among its duties, the Board does have a duty to:

> 9. Establish and impose penalties, and recommendations for punishment of persons who are subject to penalties of or punishment by the board or by other bodies, for the failure to comply with the requirements of … chapter 68A

Id. However, as argued below, the Board is not entitled to any deference in its interpretation and application of Iowa Code 68A.505, and, in fact, the Board erroneously interpreted the statute , violating the Petitioners' constitutional rights to privately engage in political activity in the process.

II. Standards of Review

This case comes to the court on a petition for agency review asserting six grounds[4] for reversal under the Iowa Administrative Procedures Act. One of those grounds, ¶33(f) of the Petition asserts that the Board's administrative actions were unreasonable, arbitrary, capricious, or an abuse of discretion. Iowa Code § 17A.19(10)(n). On this ground the court must reverse if the Board's decision was "clearly erroneous,"[5] "clearly against reason and evidence,"[6] "not based on substantial evidence or based on an

[4] Specifically the Petition alleges:

33. Each of the Board's agency actions in this case were:

a. **Unconstitutional on their face or as applied**, or based upon a provision of law that was applied contrary to our federal and state constitutions. Iowa Code § 17A.19(10)(a).

b. **Beyond the authority delegated to the agency by any provision of law and in violation of the express terms of Iowa Code §68A.505**. Iowa Code § 17A.19(10)(b).

c. **Based upon an erroneous interpretation of a provision of law** whose interpretation has not clearly been vested by a provision of law in the discretion of the Board. Iowa Code § 17A.19(10)(c).

d. **Not required by law and their negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest that they must necessarily be deemed to lack any foundation in rational agency policy**. Iowa Code § 17A.19(10)(k).

e. **Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law even if the interpretation of Iowa Code §68A.505 had been vested in the discretion of the Board**. Iowa Code § 17A.19(10)(l).

f. **Otherwise an unreasonable, arbitrary, capricious, or an abuse of discretion**. Iowa Code § 17A.19(10)(n).

[5] IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 630 (Iowa 2000)

[6] Stephenson v. Furnas Elec. Co., 522 N.W.2d 828, 831 (Iowa 1994)

erroneous application of law application of law"[7] or is "exercised on clearly untenable grounds or to a clearly unreasonable extent."[8] Because resolution the last ground is potentially a matter of degree, its analysis is best reserved until after the Court has considered the other grounds for reversal.

Each of these involve ether one or two threshold determinations by the Court: 1) the statutory interpretation of Iowa Code §68A.505, and 2) if necessary, the constitutionality of the Board's application of that statute to the Petitioners' phone conversations conducted in support of his candidacy for elected office. In resolving those questions the Court must determine whether the Board's "broad" interpretation of the statute, set forth in Iowa Administrative Code, Ethics and Campaign Disclosure [351], 351—5.1(68A) comports with the limits of its permissible statutory authority, and whether the actual application of that interpretation to the Petitioner's political conversations was clearly excessive or contrary to law in this case.

> We also believe that the scope of review given to an agency in creating rules is equally applicable to the scope of review given to an agency in interpreting those rules. Thus, an interpretation is not enforceable if its effect is beyond the scope of any delegated authority. Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 475 (Iowa 1983) (citation omitted). The interpretation would be beyond the scope of the delegated authority if i**t is at**

[7] Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ., 659 N.W.2d 563, 566 (Iowa 2003)

[8] Equal Access Corp. v. Utilities Bd., 510 N.W.2d 147, 151 (Iowa 1993)

> **variance with the enabling act or if it amends or nullifies legislative intent**.

Iowa Civil Rights Comm'n v. Deere & Co., 482 N.W.2d 386,*388 (Iowa 1992) {*emphasis added*}

> To determine the applicable standard of review of an agency's interpretation of a statute, we must determine whether the legislature clearly vested the agency with the authority to interpret the statute at issue. *Doe v. Iowa Dep't of Human* *37 *Servs.*, 786 N.W.2d 853, 857 (Iowa 2010). If the legislature clearly vested the agency with the authority to interpret specific terms of a statute, then we defer to the agency's interpretation of the statute and may only reverse if the interpretation is "irrational, illogical, or wholly unjustifiable." *Id.*; *accord Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010); *see also* Iowa Code § 17A.19(10)(*l*). If, however, the legislature did not clearly vest the agency with the authority to interpret the statute, then our review is for correction of errors at law. *Doe*, 786 N.W.2d at 857; *see also* Iowa Code § 17A.19(10)(*c*).

NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 36-37 (Iowa 2012)

No deference can be given to the Board's statutory interpretations in so far as their constitutionality is in issue. Furthermore, agencies lack authority to decide constitutional questions. Soo Line R. Co. v. Iowa Dep't of Transp., 521 N.W.2d 685, 688 (Iowa 1994)

III. Argument

A. The Board is not entitled to any special deference in its interpretation and enforcement of Iowa Code §68A.505.

No deference is due to the Board with respect to its statutory interpretation of Iowa Code §68A.505 because the Board has not been clearly, expressly or even impliedly vested with the authority to interpret that section of the Code. Moreover, even when an agency has been given power to interpret a statute, it remains bound by legislative intent and cannot transcend the plain ordinary terms and limits of the statute it is interpreting. The court determines whether an agency possesses legislative interpretive authority on a case-by-case, phrase-by-phrase basis, and does not make "broad articulations of an agency's authority." Burton v. Hilltop Care Ctr., 813 N.W.2d 250,*256 (Iowa 2012) *quoting: Renda v. Iowa Civil Rights Comm'n,* 784 N.W.2d 8,*14 (Iowa 2010). Moreover, a court should not give any deference to the agency's own opinion with respect to the underlying question of whether the particular matter has been vested by a provision of law in the agency's discretion. Iowa Code § 17A.19 (11) (a) (2014).

The Ethics Board's only grant of authority over §68A.505 is found in Iowa Code § 68B.32. The focus of that section is with respect to an entire **Chapter** 68A, and not the phrase-by-phrase meaning if Iowa Code §68A.505. The particular section pertinent to this action is not singled out for any particular interpretive authority. The focus of Iowa Code § 68B.32 is, in fact, upon the ministerial duties of the Board with respect to

administration of Chapter 68A's regulation of campaign finance and reporting: prescribing forms, reporting procedures, maintaining records and accounts etc. Iowa Code §68A.505 with its different tack of limiting appropriations for political purposes is not even in the middle of the action contemplated by Iowa Code § 68B.32A[9]

[9] 68B.32A. **Duties of the board**

The duties of the board shall include but are not limited to all of the following:

1. Adopt rules pursuant to chapter 17A and conduct hearings under sections 68B.32B and 68B.32C and chapter 17A, as necessary to carry out the purposes of this chapter, chapter 68A, and section 8.7.
2. Develop, prescribe, furnish, and distribute any forms necessary for… the procedures contained in t… chapter 68A, and section 8.7 for the filing of reports and statements…
3. Establish a process …facilitating an electronic filing procedure. …
4. Review the contents of all campaign finance disclosure reports … The board, …, may initiate action and conduct a hearing relating to requirements under chapter 68A.
5. Receive all registrations and reports that are required to be filed …
6. Prepare and publish a manual. … The board shall annually provide all officials and state employees with notification of the contents of this chapter, chapter 68A, and …
7. Assure that the statements and reports which have been filed in accordance with this chapter, chapter 68A, and section 8.7 are available for public inspection and copying ….
8. Require that the candidate of a candidate's committee, or the chairperson of a political committee, is responsible for filing disclosure reports under chapter 68A, … A candidate …, may be subject to a civil penalty for failure to file a disclosure report required under section 68A.402, subsection 1.
9. Establish and impose penalties, and recommendations for punishment of persons who are subject to penalties of or punishment by the board or by other bodies, for the failure to comply with the requirements of this chapter, chapter 68A, or section 8.7.
10. Determine, in case of dispute, at what time a person has become a candidate.
11. Preserve copies of reports and statements filed with the board…
12. Establish a procedure for requesting and issuing board advisory opinions to persons subject to the authority of the board under this chapter, chapter 68A…
13. Establish rules relating to ethical conduct for officials and state employees, including candidates for statewide office, and regulations governing the conduct of lobbyists of the executive branch of state government, including but not limited to conflicts of interest, abuse

Continues…

In the absence of any express delegation of interpretive authority, as is the case here, the Court must determine whether required deference to agency interpretation is "implied" in the statute itself. *Compare* Iowa Code § 17A.19(10)(*c*), *with* Burton at 256*;* § 17A.19(10)(*l*). *Renda,* 784 N.W.2d at 11; *see also Swiss Colony, Inc. v. Deutmeyer,* 789 N.W.2d 129, 133 (Iowa 2010) {"In the absence of such an explicit grant of authority, we must determine whether the legislature, nevertheless, 'clearly' vested the agency with the power to interpret the statute by implication."} Thus, "each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." Andover Volunteer Fire Dep't*,* 787 N.W.2d at 79–80 (quoting *Renda,* 784 N.W.2d at 13) (internal citation omitted).

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[9] *Continued:*

of office, misuse of public property, use of confidential information, participation in matters in which an official or state employee has a financial interest, and rejection of improper offers.

14. Impose penalties upon, or refer matters relating to, persons who discharge any employee, or who otherwise discriminate in employment against any employee, for the filing of a complaint … in good faith.

15. Establish fees, where necessary, to cover the costs associated with preparing, printing, and distributing materials…

16. Establish an expedited procedure for reviewing complaints forwarded by the state commissioner of elections…

17. At the board's discretion, develop and operate a searchable internet site …

18. At the board's discretion, enter into an agreement with a political subdivision authorizing the board to enforce … a code of ethics adopted by that political subdivision.

19. Impose penalties upon, or refer matters relating to, persons who provide false information to the board…

Employing that analysis here, it is certain that the legislature did not impliedly grant the Board interpretive power to expand the jurisdiction and scope of the General Assembly's own carefully worded statute prohibiting appropriations of public money for political purposes. "Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute. Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) (citations omitted)." … [*A*]dministrative rules cannot go further than the law permits. An administrative body may not use the device of promulgating rules to change or add to the law; they are not to be taken as law in themselves, but must be reasonable and used for the purpose of carrying out the legislative enactments. An administrative body may not make law or change the legal meaning of the common law or the statutes.' Holland v. State of Iowa, 253 Iowa 1006, 1010, 115 N.W.2d 161, 163 (1962); *See also*, Iowa Nat. Indus. Loan Co. v. Iowa State Dep't of Revenue, 224 N.W.2d 437, 441 (Iowa 1974) and authorities cited therein.

In § 68A.505 the legislature used commonly understood terms requiring no special agency expertise: "governing body," "expenditure of public moneys," and "political purposes" giving a defining example: "including expressly advocating the passage or defeat of a ballot issue." "[*W*]hen a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, we are more likely to conclude the power to interpret the term was clearly vested in the agency." Burton v.

Hiltop Care Center, 813 N.W.2d 250 at 256-57 (Iowa 2012) {citing *Renda,* 784 N.W.2d at 12.} In this case, the converse proposition holds true. "When a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency," the Court is "less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute." *Id.* at 257.

Unlike cases involving professional licensing boards (e.g., the Board of Pharmacy, the Board of Medicine), the Ethics Board in this case has no special expertise relative to legislatively imposed limits on public spending. In fact, legislatures and not agencies are best suited to make judgments about how public moneys can be spent. Why would the Iowa legislature delegate this authority to an agency? Certainly it would not be out of a conviction that a lay board, appointed by the governor,[10] knows better how to spend public money than the General Assembly does. .

Likewise, no deference is due because the Board's broad interpretation of Iowa Code 68A.505 departs from the legislature's general limit of the Board's authority to oversight of **state** and not local officials. Iowa Code § 68B.32A.13 provides that it is a duty of the board to "establish rules relating to ethical conduct for officials and state employees . . . including but not limited to . . . misuse of public property. . ." where

[10] There are no special requirements for members of the Iowa Ethics and Campaign Finance Disclosure Board in terms of qualification or expertise. Iowa Code § 68B.32 Board members are simply appointed by the Governor and must simply comport with political balancing requirements of Iowa Code §69.16

"official" is defined in the same section, 68B.2 (17) to be "all **statewide** elected officials, the executive or administrative head or heads of an agency of **state** government . . . 'Official' does not include officers or employees of political subdivisions of the state." {*emphasis added*} In this case, as a county official, Tom Slockett was not subject to the Board's normal jurisdiction, and only through the Board's strained expansion of the term "governing body" was it able reach him.

The language being interpreted in this case requires no special agency expertise because it is commonly used elsewhere in the Code. For example, the word "moneys" is used hundreds of times throughout the Iowa code in a much narrower sense than that which the Board decided to give it. Another term in the statute: "governing body" is likewise undefined in Chapter 68A but nonetheless has a commonly understood meaning. Employing the traditional rules of statutory construction Administrative Law Judge Farrell, found that "governing body" means the body (i.e., city council, board of supervisors, school board) that performs the legislative functions of the entity, that is permitted to issue a resolution or proclamation on a ballot issue, but not to expend public moneys to promote that position. *See Ruling on Mot. for Summ. J.* at 6-7. Thus, while the county board of supervisors is clearly the "governing body" of the county, subject to regulation under Iowa Code § 68A.505, the county auditor, which has "prescribed duties separate and subsidiary to the board of supervisors," is not. *Id.* at 7-8.

Where the Board has not received any express grant of authority to re-interpret Iowa Code Section 68A.505 and where nothing implies that it should have such authority; and where the terms to be interpreted require no special expertise and, in fact, are commonly understood and used in their ordinary sense elsewhere in the code, no interpretational deference need be given to the Board's self described "broad" interpretation of the statute.

Finally, on the underlying constitutional claims, no deference is given to agencies when reviewing constitutional claims under Iowa Code 17A.19 (10) (a). *See Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 261 (Iowa 2015) ("We review Planned Parenthood's constitutional claims de novo.) (citing *Gartner v. Iowa Dep't of Pub. Health,* 830 N.W.2d 335, 344 (Iowa 2013)). Agencies simply lack authority to interpret constitutional questions. *Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994).

B. Iowa Code Section 68A.505 cannot be applied to the Appellant or his speech.

Iowa Code § 68A.505 provides in relevant part:

> 68A.505 Use of public moneys for political purposes.
>
> 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. {*emphasis supplied*}
>
> 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. * * *

This statute was originally made effective in 1992. However, in 2004 the Ethics Board "broadly" expanded the scope this statutory prohibition by adopting a regulation extending its coverage to any use of public resources, *viz*.:

> USE OF PUBLIC RESOURCES FOR A POLITICAL PURPOSE
>
> **351—5.1(68A) Scope of chapter**.
>
> 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.
>
> This rule is **intended to implement Iowa Code section 68A.505**.[11]

[11] Iowa Administrative Code, Ethics and Campaign Disclosure [351], 351—5.1(68A) Scope of Chapter.

Immediately, it can be seen from this regulation that the Ethics Board, claiming authority under section 68A.505, has "broadly" expanded the statutory focus on "expenditures" to include any "use of public resources;" and it has altogether ignored and not even mentioned, the statute's precise limitation to only the actions of "governing bodies." Moreover, there is no mention or implementation of the statute's second paragraph instructing against interpretations that "limit the freedom of speech of officials…." The Board's decision to "construe" the statute so broadly and without limitation was nothing short of a power grab giving it assumed jurisdiction over many more citizens and offenses than had been intended by the enacting legislature in 1992.

In this case, the statute simply means **no more than what it says**: "governing bodies" shall not spend "public moneys" for "political purposes." "In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Ia R. App. Pro. 6.904(3)(m)

> "'In determining what the legislature intended ... we are constrained to follow the express terms of the statute.' State v. Byers, 456 N.W.2d 917, 919 (Iowa 1990). 'When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms.' State v. Chang, 587 N.W.2d 459, 461 (Iowa 1998). In determining plain meaning, '[s]tatutory words are presumed to be used in their ordinary and usual sense and **with the meaning commonly attributable to them**.' State v. Royer, 632 N.W.2d 905, 908 (Iowa 2001)."

Kolzow v. State, 813 N.W.2d 731,*736 (Iowa 2012) {*emphasis added*}.

1. The Board's regulations and enforcement of Iowa Code §68A.505 usurp undelegated control over elected officials.

Tom Slockett was clearly not a "governing body" at the time of his supposed offense; he was the County Auditor and had no power to appropriate county funds. The Oxford Dictionary lists the American English definition of "governing body" as: "a g**roup of people** who formulate the policy and direct the affairs of an institution in partnership with the managers, especially on a voluntary or part-time basis:"[12] {emphasis added}

In Polk County Bd. Spvs'rs v. Polk Commonwealth Charter Comm'n, 522 N.W.2d 783 (Iowa 1994) a dispute arose over whether a super-council of city mayors (who were, in fact, city council members) could, independently, be considered a "governing body." The dissent in that case noted that the majority had gone too far in designating a proposed council of mayors as a "governing body:"

> The most common definition for the "governing body" of a municipal corporation is that body which performs legislative functions. Humthlett v. Reeves, 212 Ga. 8, 12, 90 S.E.2d 14, 18 (1955); Borough of Rutherford v. Hudson River Traction Co., 73 N.J.L. 227, 238, 63 A. 84, 88 (1906); Burch v. City of San Antonio, 518 S.W.2d 540, 542 (Tex.1974). Clearly, the mayor of a city does not fall within this definition.

Id., 552 N.W.2d at 796. The dividing line between a council and a super council was a borderline case in *Polk County Bd. Spvs'rs*. It marks a threshold that lies far away from the distinctions between a county auditor and a traditional "governing body." In

[12] http://oxforddictionaries.com/definition/american_english/governing%2Bbody?region=us&q=governing+body

comparison to the close case in *Polk County Bd. Spvs'rs*, it follows, *a fortiori*, that as single elected official, lacking any power to levy taxes, appropriate money or legislate, Tom Slockett could not have been a "governing body" within the ordinary wording of the statute when he was reprimanded.

Further support against the inclusion of a county auditor within the common understanding of a "governing body" can be drawn from how our legislature has used that term in other sections of the Iowa Code. In our open meetings statute for instance, the even broader concept of "govern**mental** body" is sweepingly defined as: "a board, council [*or*] commission", a "multi-membered body formally and directly created by one or more boards, councils, commissions, or other governing bodies," an "advisory board," "commission" or "task force" created by the governor or the legislature, a publicly supported non-profit corporation, a non-profit gambling corporation, or and advisory board, commission or committee created by executive order to make "recommendations on public policy issues." Iowa Code § 21.2 In all of these examples there is not even a hint that a solitary ministerial official holding an elected office should be treated as a "govern**mental** body" much less fit within the narrower concept of a "govern**ing** body."

Indeed, among the states, the law generally distinguishes carefully between the rights and duties of "governing bodies" and those of "elected officials." *E.g.*, Traino v. McCoy, 187 N.J. Super. 638, 644,*455 A.2d 602,*605 (Ch. Div. 1982) {"This statute,

while authorizing a municipal **governing body** to prescribe the duties of its officers and employees, says nothing specific about the regulation of ethical conduct. Moreover, it has been interpreted as not giving a municipal **governing body** any authority to affect the duties and terms of office of **elected officials**"}; *La. Rev. Stat. 40:537* {"A commissioner… may be removed on any such grounds by the chief elected official…, or if no chief **elected official** exists, then by the **governing body** thereof."}; Louisiana: Op.Atty.Gen., No. 00-259A, February 2, 2001 {"The prohibition forbidding the use of public funds for car decals on private vehicles belonging to **elected officials does not effect governing bodies** …"}

2. Section 68A.505 proscribes the "expenditure" of "public moneys" for "political purposes" and not the incidental "use" of public facilities.

The Ethics Board regulations define "public moneys" as "public resources generally" and they re-define "expenditure" to mean "use." Here also, the Board has vastly increased its subject matter jurisdiction and regulatory power by "re-drafting" the statute to cover a broad range of activities and circumstances not contemplated by the legislature. In *Droste v. Kerner* the Illinois Supreme court was asked to construe a statute that prohibited the "disbursement" of "public funds" and "public moneys" to also include the "sale" of "public property." Employing the "plain language" rule of statutory construction, Illinois' high court rejected an equation of asset utilization with "disbursement" of "public moneys:"

> . . .it is manifest that the 'liberal construction' for which plaintiff contends cannot prevail. Webster's New International Dictionary, …, defines 'public funds' as being: 'Moneys belonging to a government, or any department of it, in the hands of a public official.' … Approximately the same definition is given in Black's Law Dictionary, 4th ed., p. 802, and this court has on two occasions stated that the word 'funds', in its common usage, 'ordinarily means money or negotiable instruments readily convertible into cash….' . . . In the face of these accepted meanings, the legislature could not have contemplated real estate when it referred to 'public funds', nor may this court torture the meaning of the words employed to arrive at that result.

Droste v. Kerner, 34 Ill. 2d 495,*503-4, 217 N.E.2d 73,*78-9 (1966) {*overruled on other grounds*} Contrary cases in disagreement with *Droste's* "plain language" distinction between public "funds" or "moneys" and public property do not apparently exist.

Though the distinction is important, Mr. Slockett was not even accused of misappropriating his own labor or of otherwise **depleting** public assets. As an elected official, he had no set hours of employment and could switch his attention freely and often between private matters and the responsibilities of office (Iowa Code § 331.502). His salary was set by statute and not determined by units of labor. (Iowa Code §331.907). His private cell phone calls were not billed to the county. In the final analysis, there was no evidence of any depletion of public funds or resources presented in the record below.

Admin Law Judge Farrell correctly found that the Iowa Code §68A.505 was historically tied to public debate in 1991 over the use of public funds to support or oppose ballot issues and was adopted for that purpose alone. {*See*, *ALJ Ruling p.6*}

3. The Appellant's expressive and political organizing activities are insulated from censure under Section 68A.505 by its own exception for free speech.

Having usurped authority over all public officials and over even mere "uses" of public resources, the Board extended its unauthorized reach to expression protected by the very terms of the statute it was purporting to enforce. The second unnumbered paragraph of Iowa Code Section 68A.505 provides in relevant part:

> 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.

The precise boundaries of this exception are not entirely clear since the statute's general proscription on "political purposes, including expressly advocating the passage or defeat of a ballot issue," does target political expression.

However,the most reasonable and straightforward interpretation of this exception is that it was intended to prevent the unfair muzzling of public officials in their personal speech simply because they are forced to deal so closely with allocations of state moneys and with public issues of political importance. This conclusion follows rather closely and logically from the fact that the statute is meant to restrain "governing bodies" and not state or local officials or employees. In other words, the Ethics Board went right where it was not authorized to go—"limit[*ing*] the freedom of speech of officials or employees…" instead of preventing the misappropriation of public funds.

State officials, acting in their personal capacities, should have the right to do what everyone else can do when it comes to personal expression—political or otherwise. If the President of the United States can make a political call without having to step outside of the White House grounds, so should Tom Slockett. If a campaign worker or an opposing candidate, can take a few moments at his or her work place to call a supporter on his or her own private cell phone, why shouldn't Tom Slockett be able to do precisely that? If Mr. Slockett's opponents conducted a political call from within the Johnson County Administration Building (as they may well have done[13]), why couldn't he? Such activities are surely within the ambit of protected speech critically important to a functioning democracy, and not within any imaginable focus of a statute targeting the misappropriation of public monies. The exception for speech rights of public servants in Iowa Code 68A.505 is a directive by the legislature to construe the statute narrowly where an overly-zealous interpretation could impede the private speech activities of a public official.

In this case, both a current and a former county attorney had each advised the Appellant that there was no violation of the statute for uses of county resources that do not incur any "additional cost to the government body." [*Order*, "4. Telephone Calls"] Indeed, there appears to be no comparable published decision in the country where a

[13] It is uncontested that an active supporter of Mr. Slockett's primary opponent worked in Mr. Slockett's office prior to the election and was responsible for filing at least one of the ethics complaints against Mr. Slockett. (Petition ¶'s 6 & 7; Answer ¶'s 8 & 9.)

public official has ever been lawfully punished for making private campaign calls from his or her office. To the contrary, our own Eighth Circuit Court of Appeals has held, as a constitutional proposition, that a county administrator has a right to use his private office quarters for personal expression when the impact on the county's interests is inconsequential:

In Brown v. Polk Cnty., Iowa, 61 F.3d 650 (8th Cir. 1995) a Polk County, Iowa administrator was subjected to a reprimand and ultimately discharged from employment in large part due to alleged religious proselytization on the job. At issue were such things as spontaneous prayers during meetings, religious posters and effects, etc. all displayed within his place of employment. The county's policy manual directed that no personal use of county resources was permitted. Nevertheless, the 8th Circuit reversed noting failure to show any material impact on the county as a result of the administrator's appropriation of some of his work space and activities for personal religious expression.

Moreover, the Circuit court re-instated the administrator's "Free Exercise" claim under the Constitution. Of particular note: in resolving this claim the Eighth Circuit analogized with the rights of employees under the "Free Speech Clause" by making a strong and principled comparison with Pickering v. Bd. of Ed., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

> "*Pickering* recognizes a public employee's right to speak on matters that lie at the core of the first amendment, that is, matters of public concern, so long as 'the effective functioning of the public employer's enterprise' is not interfered with. *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S.Ct. 2891, 2899,…(1987)."

Brown at 658.

So too, did Mr. Slockett have rights to engage in private political speech while in his office under the principles of *Pickering* and the *Brown* decision. If the supervisor in *Brown* could hang a poster or offer up a spontaneous prayer in his office, Tom Slockett surely had the leeway to have a personal cell phone call with a supporter within his private office quarters.

In this case, the alleged harm to "the effective functioning" of public enterprise was the diversion of public funds for private political purposes—an event that simply did not occur given that there was no incremental cost to the County for Mr. Slockett's political calls. Under *Pickering's* rule, the state has no legitimate grievance against the Appellant's attempts to balance political campaigning with close attention to his office duties. The Appellant's political organizing calls were well within the constitutional protection contemplated by the statute under which he was reprimanded.

B. Iowa Administrative Code 351—5.1(68A) is unconstitutional both facially and as applied in this case.

While the Petitioner does not challenge the constitutionality of Iowa Code §68A.505 when properly applied, the same cannot be said for the Board's formal regulation interpreting that section, IAC 351–5.1(68A). By barring the mere "use" of public resources for political expression the Board has offended our U.S. and Iowa Constitutions[14] in two ways: Firstly, as a direct proscription on political advocacy, the "use" of public resources prohibition is not even handed, nor narrowly tailored, and cannot survive scrutiny at any level. Secondly, the rule is overly broad and vague under 1st Amendment and 5th Amendment standards. By abandoning the statutory concept of illegal "expenditures" of "public monies" and replacing it with a focus on "use of public resources;" and then by further interpreting "use" of public resources to include presence within a public office while making a private political call; the Board has ventured far into territory forbidden by the First Amendment and Iowa Constitution, Art. I, §7.

In this region of law the state must tread carefully and with great precision.

> '(I)t can hardly be doubted that the constitutional guarantee (of the First Amendment) has its fullest and most urgent application precisely to the conduct of campaigns for political office.' *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971)'

Buckley v. Valeo, 424 U.S. 1,*256, 96 S. Ct. at 744 (1976) *C.J. Burger concur. & dissent.*

[14] Though there may be some differences in the respective protections provided by the state and federal constitutions, there seems to be no need to pursue that inquiry at present.

1. Presumptive invalidity and strict scrutiny

IAC 351–5.1(68A) must be analyzed as a direct regulation of political expression. It prohibits the "use of public resources generally" "for political purposes, including expressly advocating the passage or defeat of a ballot issue." It is impossible to conceive of any "political purpose" that is not directly connected to expression or participation in the democratic process. The code section underlying the regulation refers to "speech" and "express advocacy." The breadth of this regulation can be gauged in two ways: firstly by its own language: "the board will construe the phrase "expenditure of public moneys for political purposes" **broadly** to **include** the **use** of public resources **generally**;" and secondly, by the interpretation given by the Board in this case—which includes non-depleting "uses" of public facilities by elected officials.

Thus, it prohibits protected expression of the first order in a broad range of contexts. Mere occupancy of a public facility is enough to bring down the wrath of the Ethics Board. The "use of public resources" does not need to have any detectable impact on the public treasury nor do the "resources" need to be exhausted or depleted in any way. Even *de minimus* "uses" for certain expressive purposes are made illegal.

The problems with IAC 351–5.1(68A) do not end with excessive overreach however. In adopting this measure, the Ethics Board has not uniformly targeted all speech that conceivably "uses" public resources nor has it treated all speakers uniformly.

The rule punishes innocuous speech activities by officials, ignores serious misuse of property by others, and invites serious meddling and discriminatory enforcement within the political arena. The regulation does not punish officials who misappropriate public resources unless they are involved in speech related to a "political purpose," so it overlooks egregious situations based on message content alone. At the same time, it treats identical content differently depending on who the speaker is. Tom Slockett could not talk to one of his supporters within a publicly owned office, whereas other people could have the same conversation. The Board's policy as enforced here, discriminates solely against a public official who engages in political conversations within his office.

Such discrimination is "content-based" because it relates only to campaign speech; and it is "viewpoint-based" because, at least as a practical matter, it only operates against calls made by political incumbents, thus taking sides in an election.

> Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns. *Minneapolis Star,* for example, considered a use tax imposed on the paper and ink used in the production of newspapers. We subjected the tax to strict scrutiny for two reasons: first, because it applied only to the press; and, second, because **in practical application** it fell upon only a small number of newspapers.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622,*659 (1994). {*emphasis added*}

> "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, … (1972). Other principles follow from this precept. In the realm of private speech

> or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, … (1984). Discrimination against speech because of its message is presumed to be unconstitutional. See *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 641–643, …(1994)."

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819,*828 (1995).

When a general statute prohibiting constitutionally protected speech lacks neutrality toward certain speech or certain speakers or certain viewpoints it is not necessary to engage in protracted analysis, for such discrimination is precisely what the First Amendment forbids. *See*, Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd., 502 U.S. 105, 117,*126-7, 112 S.Ct. 501,*509, 116 L. Ed. 2d 476, (1991) (J.Kennedy concurring). A statute that discriminates against speech on the basis of viewpoints or content is *presumptively invalid*, and the plaintiff's *prima facie* burden ends with such a showing.

Because the regulatory enforcement in this case is "presumptively unconstitutional," there is no need, at this point, for full strict scrutiny analysis. *Id*. It is certain however, that any extended analysis, if undertaken, would need to satisfy the strictures of strict scrutiny:

> [*S*]ubstantial burdens on the right … to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless **essential to serve a compelling state interest**."

Storer v. Brown, 415 U.S. 724,*729 (1974). {*emphasis supplied*}

> If a **less restrictive alternative** would serve the Government's purpose, the legislature must use that alternative. To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.

U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803,*813, 120 S.Ct. 1878,*1886, 46 L.Ed.2d 865 (2000) {*emphasis supplied*}

The requirements of strict scrutiny in this context are strenuous:

> "Once a state interest is found to be sufficiently compelling, the regulation addressing that interest must be narrowly tailored to serve that interest. ... As with the compelling interest determination, whether or not a regulation is narrowly tailored is evidenced by factors of relatedness between the regulation and the stated governmental interest. A narrowly tailored regulation is one that **actually advances** the state's interest (is **necessary**), **does not sweep too broadly** (is not **overinclusive**), does not leave significant influences bearing on the interest unregulated (is not **under-inclusive**), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is **the least-restrictive alternative**). …In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as *precisely* tailored as possible."

Republican Party of Minn. v. White, 416 F.3d 738,*751 (8th Cir. 2005) (*en banc*) {*boldface supplied, citations omitted*}.

Applying these principles, it is not evident, that IAC 351–5.1(68A) pursues a truly "compelling" state interest in prohibiting political campaign speech from occurring within a public space. Violation of the underlying jurisdictional statute is only a serious misdemeanor even though it requires the actual misappropriation of public funds. This begs the question of how important the legislature would judge the less serious—even

inconsequential—effect on public resources punishable under the Board's no "use" regulation. At the point where there is no impact on public resources or treasuries, there surely is no compelling state interest at stake. Littering places stronger demands on public resources than the words Mr. Slockett exchanged with his supporters.

Assuming *arguendo*, that the state does have a compelling interest at stake, the Ethics Board's regulation and enforcement decisions in this case are, nevertheless, not "**narrowly tailored.**" Given that the broad net cast by the Board catches even instances such as those in this case, it is clearly an "**over-inclusive**" regulation. Nor can it be shown that such a wide net is in fact "**necessary**" to achieve the state's goal, since any actual misappropriations of public funds would presumably be more readily addressable through existing, generally applicable, statutes regulating such misdeeds as theft, embezzlement, and misconduct by a public official. {*See ALJ's Ruling p. 7*} In view of the other time-tested enforcement options to prevent misappropriation of public funds and property, IAC 351–5.1(68A) *is* not "**essential**," nor the "**least restrictive alternative.**" Nor can it be said that the Board's regulation actually "**advances**" the asserted goal, given that IAC 351–5.1(68A) does not reach a vastly greater population of people outside the Board's jurisdiction who may likewise usurp public resources for political purposes—*i.e.,* it is "**under-inclusive**". IAC 351–5.1(68A) as promulgated, interpreted and enforced by the Ethics Board does not satisfy any of the particular requirements of strict scrutiny.

2. Overbreadth & Vagueness

The Appellant, Tom Slockett, sought the advice of legal counsel before engaging in the conduct that lead to his reprimand by the Ethics Board. These weren't just any lawyers; they were, in fact, the current and former Johnson County Attorneys who had primary responsibility for interpreting and enforcing the strictures of Iowa Code Section 68A.505. How clear can the Board's regulatory implementation of that statute be, when even reasonable, seasoned prosecutors were unable to anticipate the violation later identified by the Board in sanctioning the Appellant?

A principal flaw in the Board's regulation lies in its selection of the verb "use" which is one of the most generalized, and non-specific verbs in the English language. When used with an object, "use" has many different connotations and meanings:

> **use** [v. yooz or, for past tense form of 9, yoost; n. yoos] verb, used, us·ing, noun
>
> verb (used with object)
>
> 1. to **employ** for some purpose; put into service; make use of: to use a knife.
> 2. to **avail** oneself of; apply to one's own purposes: to use the facilities.
> 3. to **expend or consume** in use: We have used the money provided.
> 4. to **treat or behave toward**: He did not use his employees with much consideration.
> 5. to **take unfair advantage of**; exploit: to use people to gain one's own ends. 6. to drink, smoke, or ingest habitually: to use drugs.
> 7. to **habituate or accustom**.
> 8. Archaic . to practice habitually or customarily; **make a practice of**. ...

Dictionary.com, http://dictionary.reference.com/browse/use?s=t {*emphasis added*)

It can be seen that to "use" public resources, could variously mean to "expend or consume" them, or to "take unfair advantage of" them, or to "customarily involve" them in an activity, or to "avail" oneself of them on a single occasion. Whereas the underlying statute concentrates on dissipation or diminution of public moneys the Board's regulation, as set forth and as applied in this case, has no focus on expenditure, loss or consumption. How much association there needs to be between a government facility and a political activity before "public resources" are illegally "used" cannot be determined by reference to the Board's regulation or by comparison to the statute which does not use such terminology.

A narrowly tailored construction of the Board's regulation is not possible, nor logical, since Board employs such language as "construe …broadly" and "the use … generally." Even if the regulation could be interpreted in narrow terms, the Ethics Board chose not to do so in this case. The Appellant could not have been reprimanded but for the Board's broad application of its own already overly broad regulation.

The Ethics Board has no where to move in defense of its regulation and actions. The Board has worded and enforced its legal requirements to reach protected speech and political activity. Ordinary citizens and lawyers are understandably confused about what is proscribed.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values.
>
> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.
>
> Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.
>
> Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone'…than if the boundaries of the forbidden areas were clearly marked.'

Grayned v. City of Rockford. 408 U.S. 104,*108-9, 92 S.Ct. 2294,*2298-9, 33 L.Ed.2d 222 (1972) {*text reformatted for clarity*}

"Vague laws in any area suffer a constitutional infirmity." but when "First Amendment rights are involved,…[*the United States Supreme Court looks*] even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer. …[*S*]uch a law must be narrowly drawn to prevent the supposed evil." Ashton v. Kentucky, 384 U.S. 195,*200, 86 S.Ct. 1407,*1410, 16 L. Ed. 2d 469 (1966). Under these standards, the Board's regulation and enforcement stance are unconstitutionally "vague" under the "Due Process" clause of the

Fourteenth Amendment and the protections for freedom of speech and political activity under the First Amendment to the U.S. Constitution and corresponding provisions of the Constitution of the State of Iowa (Art. I, §§1, 2, 7 & 9).

Nor is such fatal vagueness and over-breadth confined in effect to the Board's regulation "as applied" only to the Appellant's conduct. As a person charged civilly with violating Iowa Code Section 68A.505, the Appellant may assert over-breadth standing to challenge the Board's regulation on its face in order to protect the public.

> "the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v. Pfister, 380 U.S., at 486, 85 S.Ct., at 1121. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

The U.S. Supreme Court has indicated that a case-by-case approach to vindicating core rights of political expression or activity is inappropriate where the existence of an overly broad statute would simply continue to chill protected speech. ""Overbreadth adjudication, by suspending **all** enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." Virginia v. Hicks, 539 U.S. 113,

119, 123 S.Ct. 2191,*2197 (2003) {*emphasis added*}. "…[*T*]he First Amendment does not require 'case-by-case determinations' if 'archetypical' First Amendment rights 'would be chilled in the meantime.'" John Doe No. 1 v. Reed, ___U.S.___,130 S. Ct. 2811,*2846 (2010) J. Scalia concurring.

Thus, because a broad range of protected speech is punishable under the Board's regulation, it must be stricken as facially overly broad. No amount of case-by-case litigation can provide timely relief for those who will be chilled by the broad and vaguely worded regulation and the way it was applied in this case. In curing a defective regulation affecting core political speech, a rule of interpretation that requires case-by-case determinations is to be avoided.

> "Applying …[*the government's suggested standard*] would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. ' 'First Amendment freedoms need breathing space to survive.' ' *WRTL, supra,* … (quoting *NAACP v. Button,* …. We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned…"

Citizens United v. Fed. Election Com'n, 558 U.S. 310, 892 (2010). This Court should not hesitate to strike IAC 351–5.1(68A) in its entirety as being inconsistent with and unsupported by statutory law[15] and constitutional protections[16] for freedom of expression and political activity, and freedom from vague, arbitrary and discriminatory laws.

[15] Iowa Code §68A.505

[16] U.S. Const. Amends. I, V, IV; Iowa Const., Art I, §§ 7 & 9.

Conclusion

The relief sought by the Petitioner in this matter should be granted on all of the grounds set forth in paragraph 33 of the Petition (see *fn* 4, *supra*., p. 10). The Court should render a declaratory judgment that:

a. Iowa Code §68A.505 did not prohibit the Petitioner's conduct in participating in political campaign calls on his private cell phone from within his office.
b. Iowa Admin. r. 351—5.1(68A) is an unconstitutionally overly broad construction of Iowa Code §68A.505.
c. The Board's interpretation of Iowa Code §68A.505 in its regulations and as applied in the course of reprimanding Mr. Slockett is contrary to statute and inconsistent therewith.
d. That citizens have a constitutional right to freedom of expression and unfettered political activity that prohibits such conduct from being regulated under Iowa Code §68A.505 when no public monies are being misappropriated.

The Court should issue order injunctive relief invalidating Iowa Admin. r. 351—5.1(68A) and directing the Board to repeal the regulation or amend it to conform to the Court's decision.

The Court should issue equitable relief reversing the decision of the Board and lifting the reprimand placed on Mr. Slockett and additionally, enjoining any further administrative proceedings against Mr. Slockett with reference to this contested case.

The Court should order such additional equitable relief as appears necessary and justified in the premises of this case.

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CERTIFICATE OF SERVICE:
I certify by my signature on this document that on Friday, August 21, 2015, I served each of the parties to this electronically

Service by: ___Mail ____E-mail ____Fax __√_EDMS

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