

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TOM SLOCKETT,

Petitioner,

vs.

**IOWA ETHICS AND
CAMPAIGN DISCLOSURE
BOARD,**

An independent executive branch
agency of the State of Iowa,

Respondent.

Civil Case No. _____

PETITION
FOR JUDICIAL REVIEW
OF AGENCY ACTION
PURSUANT TO IOWA CODE
§17A.19

COMES NOW Petitioner, Tom Slockett, and by and through his attorneys Randall Wilson and Rita Bettis, respectfully states the following for his Petition for Judicial Review of Agency Action:

INTRODUCTION

Petitioner files this action, pursuant to Iowa Code § 17A.19 (2014), seeking judicial review of action taken by the Iowa Ethics and Campaign Disclosure Board (“Ethics Board”) to publicly reprimand or otherwise consequence the Petitioner, a then elected public official, for engaging in private conversations on his personally-owned mobile phone while physically present in his inner office. Petitioner seeks a reversal of the agency action and declaratory relief pursuant to Iowa Code § 17A.19 (10) on the grounds that the Ethics Board lacked the constitutional and statutory

power to selectively curtail the personal political campaign activity and freedom of speech of public officials when they are physically present in a publicly owned space.

In this case, many of the private cell phone calls that Petitioner received were from supporters of the Petitioner who wished to talk to him during normal working hours. Because the Petitioner was an elected office holder with no set hours of employment, the calls were not a misappropriation of labor or time owed to the state. No public assets were depleted, devalued, or in any other way diminished in the course of the Petitioner making or receiving private calls on his own phone. The cell phone conversations were political in nature, but were not substantively improper or illegal in any way. Nevertheless, the Petitioner was publicly reprimanded for misappropriating public resources by engaging in the phone calls while physically present in his publicly owned private office.

The Ethics Board usurped its power by misapplying a statute that exclusively regulates “governing bodies” to the Petitioner in his personal, non-legislative capacity. Then, in a further reach, the Board used that power to consequence the Petitioner for conduct that is not even proscribed by that very same statute (or any other statute, rule, or regulation for that matter). In fact, the very statute that the Board relied upon in publicly reprimanding Mr.

Slockett proscribes interpreting it in a way that “limit[s] the freedom of speech of the ... officials or employees of the governing body of, a county, city, or other political subdivision of the state.” Iowa Code § 68A.505 (2014). The Board’s public reprimand of Mr. Slockett violated his expressive and political rights under both the United States and Iowa Constitutions and threatens all other public officials with similar overreaching deprivations of constitutional rights in the future.

As a result of the Ethics Board’s action, the Petitioner suffered distress and injury to his personal reputation. He was driven from office due—in significant part—to the timing of the reprimand, publicly announced by the state Ethics Board just days before a crucial primary election. He also suffered damage to his relationships with friends and supporters. For these injuries, Petitioner seeks reversal of the reprimand and declaratory relief establishing that the Ethics Board exceeded its statutory and constitutional authority.

This case has been languishing before the Ethics Board since May 2012, and—despite the administrative resistance of the Ethics Board to judicial review—is ripe for litigation because, on June 4, 2014, the Board made a final legal determination fully rejecting the Petitioner’s legal arguments and the April 1, 2013 decision of the administrative law judge in

favor of the Petitioner. Since then, the Board has unreasonably prolonged its proceedings without further action of an unspecified nature. Given the Board's prior categorical rejections of Petitioner's legal arguments, there is no apparent possibility of granting the Petitioner any of the relief that he has sought at the agency level.

The operative facts governing this appeal have never been disputed at the agency level; thus, there is no further record to develop. Moreover, the Ethics Board admits that it lacks jurisdictional authority to rule on the constitutionality of its own actions and therefore cannot provide the Petitioner with any relief on those counts. The parties have even agreed in the past that Petitioner's arguments can, ultimately, only be resolved by the decision of a court capable of ruling on the constitutional and statutory issues. Further proceedings within the agency would be entirely futile, legally pointless, and wholly inadequate. The jurisdiction of this Court is now invoked for the purpose of securing the ultimate relief to which the Petitioner is entitled.

JURISDICTION AND VENUE

1. The Court has jurisdiction to resolve this matter pursuant to Iowa Code § 17A.19 (Judicial review of agency action) and Iowa Code §

68B.33 (“Judicial Review of the actions of the board may be sought in accordance with chapter 17A.”).

2. Venue in Polk County District Court is proper pursuant to Iowa Code § 17A.19 (2).

ALLEGATIONS

3. The Respondent agency is the independent Iowa “Ethics and Campaign Disclosure Board” (“the Board”) established by Iowa Code § 68B.32 (2014).

4. The Board has a statutory 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.

5. With pertinence to this action, the Board has the duty to enforce Iowa Code § 68A.505, set forth in its entirety below:

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.

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 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.

Iowa Code §68A.505 (2014).

4. The Board has adopted an official interpretation of Iowa Code § 68A.505 by rule:

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. [Editorial change: IAC Supplement 4/8/09]

Iowa Admin. r. 351—5.1 (68A) (2014).

5. In the 2012 primary election campaign season, the Board initiated an investigation into four distinct ethics complaints made against Mr.

Slockett, who was then the incumbent Johnson County auditor running for reelection in a contested primary race.

6. All four complaints were filed by Nathan Reckman, an employee of the Johnson County Auditor's office, who opposed Mr. Slockett's re-election.
7. On May 8, 2012 Mr. Reckman provided a deposition to the Board wherein he testified that he had resigned his position working for Mr. Slockett; that he opposed Mr. Slockett's re-election; that he had publicly endorsed Mr. Slockett's primary opponent on April 21, 2012; and that had attended the opponent's primary campaign kickoff meeting opponent after his last day of work.
8. On May 31, 2012, just five days before a primary election for the office of Auditor for Johnson County, the Board issued a public reprimand to Mr. Slockett for violating Iowa Code § 68A.505 ("Use of public moneys for political purposes.").
9. Mr. Slockett then lost the 2012 primary election and hence, his office as auditor.
10. Mr. Slockett had served as the Johnson County auditor for 35 years (1977-2012).

11. In each of the three previous primary elections in which he had an opponent, Mr. Slockett received more than twice as many votes as his rival.
12. The Board's ethics reprimand was cited at the time as a likely factor contributing to Mr. Slockett's election defeat, *e.g.*,

Slockett, of Iowa City, fell to challenger Travis Weipert, a member of the Tiffin City Council ..., following reports this spring of questionable practices at work and a reprimand last week from the Iowa Ethics Campaign and Disclosure Board.

Hayley Bruce, *Weipert Defeats Slockett in Democratic Primary for Johnson Co. Auditor*, KCRG.com (June 5, 2012), <http://www.kcrg.com/news/local/Weipert-Defeats-Slockett-in-Democratic-Primary-for-Johnson-Co-Auditor-157384535.html>
13. A full and true copy of the decision of the Board is appended hereto, and is made a part hereof. Attachment B.
14. Of the other three complaints investigated, the Board referred one complaint to the Johnson County Attorney due to lack of jurisdiction, citing Iowa Code § 68B.34A, and it dismissed the other two.
15. Mr. Slockett accepted the Board's summary of all pending allegations against him, with the sole exception of the public reprimand for violation of Iowa Code § 68A.505 ("Use of public monies for political purposes").

16. Mr. Slockett also accepted the Board's findings of fact that formed the basis for its reprimand under Iowa Code § 68A.505, *to wit*:

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.

* * *

4. Telephone calls

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.

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.

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.

SUMMARY

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 31, 2012) (emphasis added).

14. In late June 2012, and within the time allowed for appeal from the reprimand, Mr. Slockett filed an appeal from the issuance of the reprimand by requesting a contested case proceeding.
15. In his notice of appeal, Mr. Slockett stated:

The Board’s actions with respect to Counts 1–3 of its opinion, dealing with reference to an opponent, circulation of a nominating petition, and a change of policy are not contested and are not a subject of this appeal.

16. Thus, the proceedings that ensued concerned only the single matter leading to the issuance of a reprimand.
17. Before the Board scheduled a contested hearing on the alleged § 68A.505 violation, Mr. Slockett filed a Motion for Summary Judgment with the Board as permitted by its own rule, Iowa Admin. r. 351—11.14 (17A, 688).
18. The Board transmitted the case to the Administrative Hearings Division of the Department of Inspections and Appeals to decide the Motion.
19. The motion challenged the Board's claim of jurisdiction under Iowa Code §68A.505 as applied to his conduct. It also challenged the Board's formal interpretation of Iowa Code §68A.505, found in Iowa Admin. r. 351—5.1(68A), on both statutory interpretation and constitutional grounds.
20. Mr. Slockett's summary judgment motion and opening brief were filed on or about November 9, 2012.
21. The Board filed its resistance to summary judgment on November 30, 2012.

22. In its opening brief supporting its resistance to summary judgment, the Board “recognize[d] Slockett is required to raise constitutional issues at the agency level in order to preserve them for judicial review” and “reserve[d] argument on the constitutional issues raised by Slockett until this matter comes before the district court.”
23. Throughout the proceedings, the Board has agreed that due to the constitutional issues, this proceeding can only be finally resolved in the Iowa District Court.
24. Additional briefs were exchanged.
25. Oral arguments on the merits of Summary Judgment were heard by Administrative Law Judge Farrell on February 20, 2013.
26. Administrative Law Judge Farrell issued his decision on April 1, 2013 granting summary judgment to Mr. Slockett and agreeing with Slockett’s non-constitutional arguments that: 1) “A county auditor is not a ‘governing body’ regulated under Iowa Code § 68A.505 and 2) that the record does not “show an expenditure of public monies as prohibited by the statute.” *Slockett v. Iowa Ethics and Campaign Disclosure Board*, Appeal No. 12ECDB001, Ruling on Motion for Summary Judgment (Iowa Dept. of Inspections and Appeals Apr. 1,

2013) (hereinafter “Admin. Ruling on Summary Judgment”), at 5-8.

Attachment A.

27. On May 31, 2013, the Board’s attorney filed a Statement of Exceptions to Judge Farrell’s ruling on all legal issues contained therein.
28. Mr. Slockett resisted the exceptions and new briefs were filed with the Board.
29. The Board did not convene to consider the exceptions **until a year later** on June 4, 2014.
30. The board did not issue a formal ruling following its deliberations.
31. 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 Respondent did not participate.
32. The undersigned has transcribed that segment and the following is an accurate written account of the discussion that occurred.

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(?) (staff): “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”*]

33. 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.
34. Approximately twenty 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."

35. The motion was resisted the Board.
36. 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.
37. **Eleven months** have passed since the board rejected Judge Farrell's decision; approximately **twenty-three months** have passed since Judge Farrell issued his decision; and the Board has taken no further action to resolve this matter.
38. There would be no point in continuing administrative proceedings because Mr. Slockett's appeal rests solely on the legal arguments and grounds presented in his motion for summary judgment and those have been fully rejected by the Board.
39. The Petitioner has suffered personal injury as a result of the board's actions including but not limited to damage to his future political career, injury to reputation, humiliation and loss of income.
40. The Petitioner was made a party to these proceedings by the actions of the Board.

41. An Iowa County Auditor is not a “governing body” within the meaning of Iowa Code § 68A.505.
42. Use of a communications device such as a cell phone is not an “expenditure of public moneys” within the meaning of Iowa Code § 68A.505.
43. The Petitioner, Tom Slockett, was reprimanded for conduct excluded from regulation under the second unnumbered paragraph of Iowa Code § 68A.505.
44. The conduct for which the Petitioner was reprimanded is fully protected by his state and federal rights of freedom of expression and his right to engage in political activity, including running for office. U.S. Const. amend. I; Iowa Const. art. I, § 7.
45. Petitioner has exhausted all adequate administrative remedies and any further agency action would not provide him with an adequate remedy. Iowa Code § 17A.19(1) (2014).
46. The Petitioner remains aggrieved and adversely affected by the Board’s final agency action or the lack thereof in his contested case proceedings.

47. The Petitioner also is aggrieved by, and challenges, the Board's rule interpreting Iowa Code § 68A.505, Iowa Admin r. 351—5.1(68A), as set forth above.
48. Thus this Petition for Judicial Review is supported by two jurisdictional grounds:
 - a. A challenge to the Board's interpretational rule Iowa Admin. r. 351—5.1(68A) on the grounds that it was adopted contrary to statutory and constitutional requirements, and is inconsistent with legislative intent;
 - b. A challenge for individual relief from a contested case proceeding in which there was no material dispute of facts. *See* Iowa Code § 17A.10A.
49. Relief is sought on the following grounds:
 - a. On the basis of erroneous statutory interpretation by the agency as set forth both in the underlying administrative proceedings, and in its official regulatory interpretation of Iowa Code § 68A.505
 - b. On the basis of the unconstitutionality of the Board's actions and statutory interpretations as applied to the Petitioner in this case in the administrative proceedings below.

50. The Board's "agency actions" relevant to this proceeding consist of adopting an interpretation of Iowa Code § 68A.505 and reprimanding Mr. Slockett.
51. 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); U.S. Const. amend. I, XIV; Iowa Const. art. I, § 7.
 - 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).

RELIEF SOUGHT

WHEREFORE, the Petitioner, Tom Slockett, prays for the following relief.

- A. A declaratory ruling that:
 - a. Iowa Code § 68A.505 did not prohibit the Petitioner's conduct in participating in political campaign calls on his private cell phone.
 - b. Iowa Admin. r. 351—5.1(68A) is an unconstitutionally overly broad construction of Iowa Code § 68A.505 in violation of the First Amendment of the U.S. Constitution, as applied to the States through the Fourteenth Amendment, and under Art. I, §

7 of the Iowa Constitution. U.S. Const. amend. I, XIV; Iowa Const. art. I, § 7.

- 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, under the First and Fourteenth Amendments to the U.S. Constitution and Art. I, Section 7 of the Iowa Constitution, that prohibits such conduct from being regulated under Iowa Code § 68A.505 when no public monies are being misappropriated.
- B. An order reversing the decision of the Board and lifting the reprimand placed on Mr. Slockett and enjoining any further proceedings in the agency with reference to this contested case.
- C. An order 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.
- D. The costs of this suit, and;
- E. Such other and further relief as this Court may deem just and proper.

—∞—

Respectfully submitted,

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Date: May 21, 2015

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:

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- (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).

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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).

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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”).

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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).

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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 *Carolan 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).

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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).

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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.

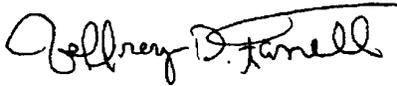
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This finding is not to condone appellant's actions, which were clearly causing dissention within his office. The undisputed facts in the reprimand give the impression of a long-time politician that was doing more to try to keep his job than do his 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

IOWA ETHICS AND CAMPAIGN DISLCOSURE BOARD

IN THE MATTER OF:	CASE No. <u>2012 IECDB 05</u>
TOM SLOCKETT, Johnson County Auditor	REPRIMAND

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.

BACKGROUND

Nathan Reckman filed a complaint against Mr. Slockett on April 25, 2012 alleging Mr. Slockett used government resources for political purposes in violation of Iowa Code section 68A.505. On April 27, 2012, the Iowa Ethics and Campaign Disclosure Board ("Board") determined the complaint was legally sufficient and ordered its staff to conduct an expedited investigation. See Iowa Code § 68B.32B (setting out the Board's complaint procedures and defining a legally sufficient complaint). The staff's investigation included interviews and/or depositions of Mr. Slockett, Mr. Reckman, ten members of Mr. Slockett's staff, two supporters of Mr. Slockett named in the complaint, as well as the current and former Johnson County Attorneys. The Board's staff also reviewed numerous documents and submitted its findings to the Board for review.

The complaint included several allegations. First, it alleged Mr. Slockett sent an email from his county email address to his office staff that referenced his opponent in the Democratic primary for the office of Auditor. The email stated "Well, at the joint appearance with my opponent last night, he blasted me for not making it easy enough for students and minorities to vote" Second, the complaint alleged Mr. Slockett circulated his nomination petition among the Auditor's office staff during work hours and confronted staff who did not sign the petition. Third, the complaint alleged Mr. Slockett changed a 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 related to Mr. Slockett's primary opponent. Fourth, the complaint alleged Mr. Slockett made numerous campaign-related telephone calls during the week of April 16, 2012 while he was in the Auditor's office.

ANALYSIS

Iowa Code section 68A.505 prohibits the use of public resources for political purposes. "Public resources" is broadly defined to mean "the moneys, time, property, facilities, equipment, and supplies of the executive branch of state government, a county, city, public school, or other political subdivision." Iowa Admin. Code r. 351-5.3. "Political purposes" means "the express advocacy of a candidate or ballot issue." Iowa Code § 68A.102(19). "Express advocacy" means a campaign contribution or a communication that contains "explicit words that unambiguously indicate the communication is recommending or supporting a particular outcome in the election with regard to any clearly identified candidate or ballot issue." *Id.* § 68A.102(14).

1. Reference to opponent in email

Mr. Slockett acknowledged sending the email in question to several members of his staff. While the reference to Mr. Slockett's opponent may have been superfluous, the Board finds the email did not contain express advocacy either in favor of Mr. Slockett's candidacy or against his opponent's candidacy. Therefore, Mr. Slockett did not violate section 68A.505 when he sent the email to several members of his staff using his county email address.

2. Circulation of nomination petition

Mr. Slockett acknowledged circulating his nomination petition in the Auditor's office among his employees during office hours. He also acknowledged that no other candidate was given the same opportunity to circulate his or her nomination petition in the same manner. Mr. Slockett expressed regret for circulating his petition in his office. He apologized to his office staff and voluntarily reimbursed his office \$34.40, for lost wages and benefits, based on a calculation of 5 minutes per person for 17 employees to review and sign (or not sign) his nomination petition. All of the staff members interviewed or deposed agreed Mr. Slockett never asked them to support his candidacy nor did he ask them not to support his opponent's candidacy.

The Board has recently found that given the statutory language, section 68A.505 is not violated if a nomination petition is circulated in a government

office or placed on a government office counter for members of the public to sign since a nomination petition does not expressly advocate for the candidate. IECDB AO 2012-01. However, the Board found that Iowa's conflict-of-interest statute, Iowa Code section 68B.2A, would be violated "if a government official or employee circulated his or her nomination petition in a government office . . . if other candidates were not given the same opportunity." Therefore, Mr. Slockett did not violate section 68A.505 when he circulated his nomination petition among his employees during office hours. Because there is prima facie evidence Mr. Slockett violated 68B.2A by circulating his nomination petition in the Auditor's office while other candidates were not given the same opportunity, the Board refers this matter to the Johnson County Attorney who has jurisdiction to consider complaints alleging violations of chapter 68B by local officials or local employees. See Iowa Code §§ 68B.32, 68B.34A.

3. Change in office policy

Mr. Slockett acknowledged he provided his friend with the voter registration information of Mr. Slockett's opponent over the telephone. Mr. Slockett further acknowledged his friend told him she was writing a letter to the editor in support of Mr. Slockett and wanted to note in her letter that Mr. Slockett's opponent was recently registered as a Republican. Mr. Slockett said he was not aware his office had a policy requiring such requests to be made in person with a signature and said he has never seen a copy of the policy. Many of Mr. Slockett's employees stated the Auditor's office always required individuals to request voter information in person with a signature. Following Mr. Slockett's friend's request, Mr. Slockett informed his staff that they may provide voter information over the telephone.

The Board believes it is the prerogative of the Auditor to set (or change) office policy regarding internal matters such as how requests for voter records should be handled. The Board does not believe Mr. Slockett providing the voter information of his opponent over the telephone amounted to express advocacy in favor of Mr. Slockett's candidacy or against the candidacy of Mr. Slockett's opponent. Moreover, the Board does not believe changing the policy on how voting records may be obtained is express advocacy. Therefore, Mr. Slockett did not violate 68A.505 when he provided his friend with his opponent's voter information, even assuming such a practice was a change in office policy.

4. Telephone calls

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.

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.

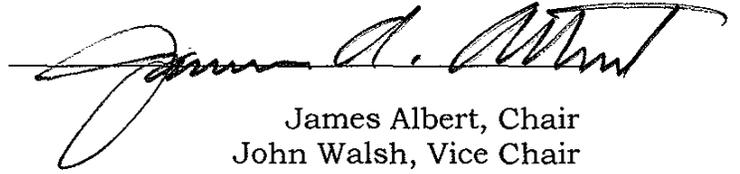
The Board finds 68A.505 prohibits the use of government resources, including office facilities and equipment, for political purposes regardless of whether or not the use of these resources incurs an additional cost to the government body. Mr. Slockett expressly advocated for his candidacy when he telephoned 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.

SUMMARY

Mr. Slockett is reprimanded for using government resources for political purposes in violation of Iowa Code section 68A.505. Pursuant to Iowa Code Administrative Rule 351—9.4(3), he may appeal the issuance of the reprimand by submitting within 30 days a written request for a contested case hearing. The Board will send a copy of the complaint along with this Order to the Johnson County Attorney for review to determine whether chapter 68B of the Iowa Code was violated when Mr. Mr. Slockett circulated his nomination petition among his staff during office hours.

By direction of the Board,

A handwritten signature in black ink, appearing to read "James A. Albert". The signature is written in a cursive style with a large, looping initial "J".

James Albert, Chair
John Walsh, Vice Chair
Saima Zafar
Carole Tillotson
Jonathan Roos
Mary Rueter