



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

August 23, 2013

Re: Use of State Facilities, Equipment and Supplies, and Personnel to Produce and Distribute Television and Radio Programs for Television and Radio Outlets
AO-E-13-004

Dear Requester:

This is in response to your request for a formal advisory opinion. You have asked whether the State Government Ethics Act (“Ethics Act”), North Carolina General Statutes (“G.S.”) Chapter 138A, would restrict a public servant’s use of State facilities, equipment and supplies, and personnel to produce and distribute certain television and radio programs and public service announcements to various public and commercial television networks and radio stations. Those programs and public service announcements would feature the public servant.

This formal advisory opinion is based upon the information provided in your request and was adopted by the Commission at its August 23, 2013, meeting.¹

I. Brief Conclusion.

The Commission has determined that the Ethics Act would restrict a public servant’s use of State facilities, equipment and supplies, and personnel to produce and distribute those television and radio programs and public service announcements to various public and commercial television networks and radio stations.

II. Facts.

A public servant has been provided with an opportunity to use State resources in order to produce and distribute various television and radio programs and public service announcements in which he will appear. Those programs and announcements will be produced and distributed during regular business hours. State resources that will be used in the production and distribution

¹ Please see the enclosure entitled “Formal Advisory Opinions Issued by the State Ethics Commission” for further information regarding the protections offered to individuals receiving those opinions.

of these programs/announcements will include camera, recording, and computer equipment, computer software, supplies, and staff.

Once produced, those television and radio programs and public service announcements will be distributed to various commercial and public television and radio stations with a request that those stations donate air-time for the broadcast of those programs. No State money will be used to purchase air-time or otherwise pay for the broadcast of those programs. Moreover, no private resources will be used for the production, distribution, or broadcast of the programs.

You expect that the television programs will feature the public servant hosting a variety of guests and will follow a one-on-one interview or panel format. You have not yet identified specific individuals who will participate in those programs, but anticipate that topics will include political issues (including interviews of policymakers and elected officials), the work of various non-profit organizations, and other topics of interest to the public.

The public servant is subject to the requirements of the Ethics Act and is therefore also considered to be a “covered person” under the Act.

III. Applicable Statutory Provisions.

Section 31 of the Ethics Act is entitled “Use of public position for private gain.” That section restricts officials from taking official actions which benefit themselves or individuals or entities with whom the official is associated. That section also restricts the use of the official’s title and name, picture, and voice as follows:

A. Use of Title in Nongovernmental Advertising.

G.S. 138A-31(b) provides that a covered person (a term that includes public servants):

Shall not mention or authorize another person to mention the covered person’s public position in nongovernmental advertising that advances the private interest of the covered person or others.

The term “nongovernmental” means that “the funding or resources used to produce and publicize the advertisement was not derived from the State ... or the federal government.” 30 NCAC 08.0101(a). “Advertising” is defined as “a written or oral communication that is published, disseminated, circulated, or placed before the public for the purpose of attracting public attention to a product, business, or service.” *Id.* G.S. 138A-31(b) lists a number of exceptions to the prohibition against the use of a covered person’s title.

B. Use of State Funds for Advertising and Public Service Announcements Featuring Covered Persons.

G.S. 138A-31(c) also generally prohibits a covered person from using or permitting:

- i. The use of State funds for any advertisement or public service announcement;

- ii. In a newspaper, on radio, television, magazines, or billboards;
- iii. That contains that covered person's name, picture, or voice;
- iv. Except in case of State or national emergency and where the announcement is "reasonably related to the person's official function."

Fund-raising on behalf of public radio or television is exempt from this prohibition. There is an almost identical restriction against the use of "State funds" by "declared candidates" for the Council of State. G.S. 163-278.16A.²

III. Analysis.

"State funds" is not defined in G.S. 138A-31(c) or G.S. 163-278.16A. Moreover, although the Commission recently determined that the term "State funds" included federal grant moneys held in State accounts, there are no formal advisory opinions or court decisions that consider whether the term "State funds," as used in G.S. 138A-31(c) or 163-278.16A, includes State facilities, personnel, or equipment.

The foremost objective of statutory interpretation is to give effect to the intent of the legislature. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297 (1998), *cert. denied*, 526 U.S. 1098 (1999). The primary indicator of legislative intent is statutory language. "[W]here a statute is ambiguous or unclear as to its meaning, we must interpret the statute to give effect to the legislative intent." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 767 (2009). However, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *Frye Reg'l Med. Ctr. V. Hunt*, 350 N.C. 39, 45 (1999).

In a 2010 formal advisory opinion issued with respect to a public servant's hosting of a radio show on a local radio station, the Commission found that G.S. 138A-31(c)'s prohibition against using State funds did not restrict the public servant's participation in that radio program. AO-E-10-003 (November 19, 2010). The Commission concluded that G.S. 138A-31(c) was inapplicable since State resources were not being used to pay for the air time or production of this program.

The breadth of a Montana statute that is almost identical to the North Carolina prohibition against the use of State funds by certain candidates was recently considered by a Montana District Court, the court of general jurisdiction in Montana. *Montana Republican Party v. Schweitzer*, Cause No. BDV-2012-242 (2013). In that case, the Court considered whether the term "state funds" prohibited the use of state employee time, state facilities, and state equipment.

² That provision applies beginning December 31st prior to a general election in which a Council of State office will be on the ballot and does not restrict use of State funds for billboard and magazine advertisements.

The Court found that the legislature's use of the term "state funds" did not restrict the use of state facilities, personnel, or equipment. In so concluding, the court affirmed a decision by the Montana Commissioner of Political Practices in which Deputy Commissioner James H. Goetz concluded that the term "state funds" did not include State resources. Both decisions relied upon the fact that the same section of the statute interpreted by the court, unlike the provision at issue in the Ethics Act, also restricted the use "of public time, facilities, equipment, supplies, personnel, or funds" for private business purposes or to solicit support for or opposition to any political committee. It was therefore determined that the statute's use of different terms in the two subsections demonstrated that the legislature did not intend to restrict the use of employee time, facilities, and equipment when it used the term state funds, but rather intended to refer to the use of state money.

In the same matter, however, an earlier decision of Commissioner Unsworth reached the opposite result. In granting summary judgment to the Montana Republican Party, the Commissioner concluded that the restriction against a candidate's use of "state funds" not only restricted the use of state monies, but also restricted the use of state resources. That conclusion was based upon the legislative history of the provision and the fact that it was adopted to prevent state officials who were also candidates from using all state resources to produce public service announcements. Moreover, Commissioner Unsworth observed that a contrary interpretation would have an absurd result—that candidates could use state resources without limitation for producing such advertisements as long as state monies were not used to purchase air time.³

Similarly, the Commission understands that the intent of G.S. 138A-31(c) was to restrict State officials from using State resources available to those officials to promote their personal or political interests. That is why the restriction allowed the use of those resources only where there was a clear public purpose—in the case of State or national emergencies. That provision was adopted in response to recent public service announcement broadcasts which had featured various elected officials. The preamble to S.L. 2006-201, codified as the Ethics Act, stated that one of the purposes behind the Act was to ensure that "acceptance of authority granted by the people to elected and appointed officials imposes a commitment of fidelity to the public interest, and the power so entrusted should not be used to advance narrow interests for oneself and others."

Based upon principles of statutory interpretation and what the Commission understands to be the intent of this statutory provision, the Commission concludes that the term "State funds" includes your use of State personnel, facilities, equipment, or supplies in connection with the production or distribution of the proposed radio and television programs or public service announcements.

Accordingly, unless the exception for State and federal emergencies applies, G.S. 138A-31(c) would restrict the use of all State resources, including personnel, facilities, equipment, or supplies, for the purpose of producing, distributing, or broadcasting programs or public service

³ Interestingly, Commissioner Unsworth observed that the Montana restriction against the use of State funds for candidates was "taken from a North Carolina statute that also prohibits public officials, as candidates, from using state funds for PSAs. North Carolina General Statute § 163-278.16A."

announcement in a newspaper or magazine, on radio or television, or on billboards if that program or public service announcement includes your name, picture or voice.⁴

Finally, since private funds will not be used to produce and publicize the programs or public service announcements, G.S. 138A-31(b) is inapplicable to your questions.

IV. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission's staff if you have any questions about the foregoing formal advisory opinion.

⁴ There are other statutory restrictions against the use of State resources for private purposes, including G.S. 138A-13(a), prohibiting the use of "State funds, supplies, or vehicles" to support or oppose "any candidate, party, or issue" in an election, and G.S. 14-91, restricting State officers and employees from misapplying or converting State "property and effects" to their own use. State personnel policies similarly restrict the use of "state property" for personal gain.

Formal Advisory Opinions Issued by the State Ethics Commission
Pursuant to the Ethics Act

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).