

Uselman, Tracey

Subject: FW: Special Committee on Election Law Review



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-----Original Message-----

From: Mike Wittenwyler [mailto:Mwittenw@gklaw.com]
Sent: Tuesday, February 08, 2005 7:24 PM
To: Sen.Leibham
Cc: Conlin, Robert
Subject: Special Committee on Election Law Review

Sen. Leibham:

Occurred to me during a meeting this week that one additional issue the Committee should consider is s. 12.11(3)(d) and the need to clarify the limits on the use of transportation to get voters to the polls. In recent elections, this has become a subject of concern to many employers and advocacy groups in Wisconsin. See, for example, copies of two letters sent last year in connection with the interpretation of this statute.

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SHANE FALK
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Executive Director

April 5, 2004

Linda U. Burke
Assistant City Attorney
Milwaukee City Attorneys Office
200 East Wells Street #800
Milwaukee, WI 53202-3515

Re: Providing Rides to Polling Places on Election Day

Dear Ms. Burke:

This letter is in response to your inquiry of April 5, 2004, to wit:

If a campaign committee or other registrant, or other person, rents or leases a vehicle for election day, for the purpose of providing transportation to polling places on election day, is that registrant or other person in violation of s.12.11, Stats., or does the exception to s.12.11, Stats., in sub.(3)(d) of that statute apply?

Please bear in mind that the enforcing authority for ch.12, Stats., violations, and for ch.11, Stats., violations involving local elections, is the district attorney of the county in which the violation is alleged to have occurred, not the State Elections Board. The activity described in your inquiry – transporting voters to the polls on election day – is activity over which the district attorney of the applicable county would have enforcement authority, if any such authority exists. Consequently, the district attorney of the applicable county is the enforcing authority who will determine whether ch.12, Stats., has been violated by a person or organization having provided free-of-charge transportation to a polling place on election day.

Subject to the preceding discussion, what we have said in an earlier informal opinion given to the Wisconsin Council on Developmental Disabilities, (a copy of which you already have), on a similar subject, is that nonpartisan registration or get-out-the-vote drives, as a rule, are strongly encouraged in Wisconsin. In fact, under s.11.04, Stats., “nonpartisan campaigns to increase voter registration or participation at any election that are not directed at supporting or opposing any specific candidate, political party, or referendum,” are, essentially, not subject to campaign finance regulation by ch.11 of Wisconsin’s Statutes:

11.04 Registration and voting drives. *Except as provided in s. 11.25 (2) (b), ss. 11.05 to 11.23 and 11.26 do not apply to nonpartisan campaigns to increase voter registration or participation at any election that are not directed at supporting or opposing any specific candidate, political party, or referendum.*

Wholly apart from campaign finance regulation, however, Wisconsin does have a statute that prohibits offering anything of value to any person to go to or refrain from going to the polls:

12.11 Election bribery. (1) *In this section, "anything of value" includes any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds \$1. The prohibitions of this section apply to the distribution of material printed at public expense and available for free distribution if such materials are accompanied by a political message.*

(1m) *Any person who does any of the following violates this chapter:*

(a) Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:

1. Go to or refrain from going to the polls.

2. Vote or refrain from voting.

3. Vote or refrain from voting for or against a particular person.

4. Vote or refrain from voting for or against a particular referendum; or on account of any elector having done any of the above.

(b) Receives, agrees or contracts to receive or accept any money, gift, loan, valuable consideration, office or employment personally or for any other person, in consideration that the person or any elector will, so act or has so acted.

(c) Advances, pays or causes to be paid any money to or for the use of any person with the intent that such money or any part thereof will be used to bribe electors at any election.

The statute does contain an exception, however, in sub.(3)(d), for persons who use their own vehicle to transport electors to or from the polls without charge:

(3)(d) *This section does not prohibit any person from using his or her own vehicle to transport electors to or from the polls without charge.*

The language of sub.(3)(d) gives rise to several questions, answers to which are not provided in s.12.11, Stats., or elsewhere in chs. 5 to 12. Those questions are: What is meant by the term "person"? Is "person" limited to individuals or does it include corporations, associations, or political committees, including campaign committees or other registrants to which your question alludes? Even if the statute is limited to individuals, if organization members use their own vehicles or vehicles leased for them by the organization, is that activity protected as the activity of that "person"? Also, what is meant by the term "own vehicle" – does that mean that the "person" must own the vehicle or could the person lease the vehicle? What if the "person" is the principal operator of the vehicle, but ownership of the vehicle is with the "person's" spouse? If the person does not have to "own" the vehicle in the sense of absolute ownership, and if the person rents the vehicle for election day or if the person has the use of the vehicle for election day, is the vehicle considered the person's "own" vehicle for that day?

In a modification of its earlier opinion, the Board's staff believes that the term "person," in s.12.11(3)(d), Stats., applies to the individual owner or operator of the vehicle that is used to transport electors on election day. The adjectives "his or her," that precede the term "own vehicle," used in s.12.11(3)(d), Stats., usually refer to individuals and not to corporations, associations or political committees. The Board's staff also believes that the subsection's term "own vehicle" refers to any vehicle that the individual owns, leases or regularly or usually operates, on days besides election day. The Board's staff does not believe that the term "own vehicle" applies

to a vehicle that is rented or leased for election day, or for the week in which election day occurs, solely for the purpose of transporting electors to the polls on election day.

The Board's staff does not believe that the Wisconsin legislature, in providing the exclusion of sub.(3)(d) of s.12.11, Stats., contemplated the renting or leasing of vehicles solely for the purpose of transporting electors to the polls on election day. This conclusion – that the exception of s.12.11(3)(d), Stats., does not apply to the renting of vehicles for the purpose of transporting electors to the polls - does not mean that the legislature has prohibited or even expressed opposition to the renting of buses, vans or other vehicles for election day or election week solely for the purpose of transporting electors to the polls. Nor does that conclusion mean that s.12.11's prohibition on

“Offer[ing]s, give[ing]s, lend[ing]s or promise[ing]s to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:

- 1. Go to or refrain from going to the polls.*
- 2. Vote or refrain from voting.*
- 3. Vote or refrain from voting for or against a particular person.*

necessarily applies to a political committee (or an individual) who rents or leases a vehicle for the purpose of transporting electors to the polls on election day. Whether such prohibited activity occurred would be a facts-and -circumstances determination on a case-by-case basis. Providing a ride to the polls on election day does not, necessarily, induce a voter to:

- 1. Go to or refrain from going to the polls.*
- 4. Vote or refrain from voting.*
- 5. Vote or refrain from voting for or against a particular person.*

An elector may have otherwise been disposed to go to the polls to vote for whomever and simply took advantage of the free ride without having been induced to do anything. There ought to be a difference between providing an accommodation – a ride, for instance – to an elector and providing an inducement. If the ride to the polls is nothing more than that and does not include campaign messages for any candidate or referendum, the burden of proving prohibited inducement will be far heavier than it would be if the transportation is covered with campaign advertising and/or the ride to the polls is accompanied with spoken and/or distributed campaign messages.

What the Board's staff's conclusion means is that the safe harbor provided by s.12.11(3)(d), Stats., does not apply to vehicles leased or rented for the purpose of transporting electors to the polls on election day. What effect the unavailability of that safe harbor may have on the use of a vehicle that has been leased or rented for the purpose of transporting electors on election day, however, will depend on the facts and circumstances of each case and the applicability of the rest of s.12.11, Stats.

I hope that this letter has been responsive to your questions and concerns, but if it hasn't, or if I can be of any other assistance, please give me a call.

This is an informal opinion of the staff of the State Elections Board and not a formal opinion, issued pursuant to s.5.05(6), Stats., of the Elections Board, itself.

STATE ELECTIONS BOARD

George A. Dunst
Legal Counsel

cc: Michael Mahoney
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SHANE FALK
Chairperson

KEVIN J. KENNEDY
Executive Director

January 27, 2004

Howard Seifert
Wisconsin Council on Developmental Disabilities
600 Williamson Street
Madison, WI 53703

Re: Providing Rides to Polling Places on Election Day

Dear Mr. Seifert:

This letter is in response to your inquiry of December 18, 2003, to wit:

We are looking for an opinion regarding transportation. We are wondering if it is legal or acceptable for our organization (WCDD) to give money to disability organizations to fund efforts to drive people or provide rides for people to the polls to vote. Would this be considered influencing the vote or buying votes? In motor voter states, service providing agencies are expected to do this sort of activity. Our money is federal. We'd like to do this next year if we can. Please advise. Thanks

The Board's staff has to preface its comments with the caveat that the Elections Board can offer no opinion on the propriety of the expenditure of federal money. Only an agency of the federal government can give you that type of advice. The Board's staff can give advice about the expenditure of private money for the purpose of "fund[ing] efforts to drive people or provide rides for people to the polls to vote." Thus, we can discuss the validity of disability organizations' "fund[ing] efforts to drive people or provide rides for people to the polls to vote."

Also, please bear in mind that the enforcing authority for ch.12, Stats., violations, and for ch.11, Stats., violations involving local elections, is the district attorney of the county in which the violation is alleged to have occurred, not the State Elections Board. The activity described in your inquiry – transporting voters to the polls on election day – is activity over which the district attorney of the applicable county would have enforcement authority, if any such authority exists. Consequently, the district attorney of the applicable county is the enforcing authority who will determine whether ch.11, Stats., or ch.12, Stats., has been violated by an organization having provided free-of-charge transportation to a polling place on election day.

Subject to the preceding discussion, nonpartisan registration or get-out-the-vote drives, as a rule, are strongly encouraged in Wisconsin. In fact, under s.11.04, Stats., "nonpartisan campaigns to increase voter registration or participation at any election that are not directed at supporting or opposing any specific candidate, political party, or referendum," are, essentially, not subject to campaign finance regulation by ch.11 of Wisconsin's Statutes:

11.04 Registration and voting drives. *Except as provided in s. 11.25 (2) (b), ss. 11.05 to 11.23 and 11.26 do not apply to nonpartisan campaigns to increase voter registration or participation at any election that are not directed at supporting or opposing any specific candidate, political party, or referendum.*

Wisconsin does, however, have a statute that prohibits offering anything of value to induce any person to go to or refrain from going to the polls:

12.11 Election bribery. *(1) In this section, "anything of value" includes any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds \$1. The prohibitions of this section apply to the distribution of material printed at public expense and available for free distribution if such materials are accompanied by a political message.*

(1m) Any person who does any of the following violates this chapter:

(a) Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:

- 1. Go to or refrain from going to the polls.*
- 2. Vote or refrain from voting.*
- 3. Vote or refrain from voting for or against a particular person.*
- 4. Vote or refrain from voting for or against a particular referendum; or on account of any elector having done any of the above.*

(b) Receives, agrees or contracts to receive or accept any money, gift, loan, valuable consideration, office or employment personally or for any other person, in consideration that the person or any elector will, so act or has so acted.

(c) Advances, pays or causes to be paid any money to or for the use of any person with the intent that such money or any part thereof will be used to bribe electors at any election.

The statute does contain an exception, however, in Para.(3)(d), for persons who use their own vehicle to transport electors to or from the polls without charge:

(3)(d) This section does not prohibit any person from using his or her own vehicle to transport electors to or from the polls without charge.

The language of sub.(3)(d) gives rise to several questions, answers to which are not provided in s.12.11, Stats., or elsewhere in chs. 5 to 12. Those questions are: What is meant by the term "person?" Is "person" limited to individuals or does it include corporations, associations, or agencies such as Wisconsin Council on Developmental Disabilities or the various disability organizations to which your letter alludes? Even if the statute is limited to individuals, if organization members use their own vehicles or vehicles leased for them by the organization, is that activity protected as the activity of that "person"? Also, what is meant by the term "own vehicle" – does that mean that the "person" must own the vehicle or could the person lease the vehicle? What if the "person" is the principal operator of the vehicle, but ownership of the vehicle is with the "person's" spouse? If the person does not have to "own" the vehicle in the sense of absolute ownership, and if the person rents the vehicle for election day or if the person has the use of the vehicle for election day, is the vehicle considered the person's "own" vehicle for that day?

To render s.12.11(3)(d)'s application consistent with the "Equal Protection Clause" of the 14th Amendment to the U.S. Constitution, the Board's staff has always interpreted the term "own vehicle" very broadly to include a vehicle that a person has rented for their own use on election day. In the staff's interpretation of the phrase "own vehicle", a vehicle leased or rented by a person is the person's "own vehicle" for the duration of the lease or rental agreement.

If the statute is interpreted to protect (from criminal prosecution) only those persons who "own" vehicles in the sense of being the "owner" of that vehicle, and to not protect those persons who do not "own" a vehicle in the sense of being the owner of that vehicle (or who do not "own" a vehicle suitable for transport of voters that they have rented for one day), but who lease a vehicle, an "equal protection" problem may exist. This has become much more of an issue in the last twenty years when the number of persons who lease (as opposed to purchase) a vehicle has increased exponentially. If the legislature intended to proscribe the practice of renting buses or other multi-person carriers, for purposes of transporting voters to the polls, the legislature could or would have been more precise. And even if the legislature had been more precise, its language, if not its intent, may have had an equal protection "problem" if it had chosen to use property ownership as the basis for distinguishing (not to mention "criminalizing") those who may facilitate exercise of the franchise by others from those who may not.

Returning to the question you have asked at the beginning of this letter:

We are wondering if it is legal or acceptable for our organization (WCDD) to give money to disability organizations to fund efforts to drive people or provide rides for people to the polls to vote. . . . Our money is federal.

Our response is that disability organizations may conduct "*nonpartisan campaigns to increase voter registration or participation at any election that are not directed at supporting or opposing any specific candidate, political party, or referendum,*" including providing free-of-charge transportation to the polls on election day. As long as that transportation is conducted in a non-partisan manner without any attempt to support or oppose any specific candidate, political party or referendum, that transportation is not subject to prohibition by either ch.11 or ch.12 of the Wisconsin Statutes. Whether your organization may contribute money to the disability organization who conducts the voter drive is a determination to be made by the federal agency that provides your funding.

One final caveat to all of the above is that if the organization that intends to provide transportation to the polls on election day is a political committee registered with the State Elections Board or with a local filing officer in Wisconsin, that organization's activity is regulated by chs.11 and 12 of the Wisconsin Statutes and it is not able to take contributions from agencies, like yours, that are publicly funded, (including organizations that are funded with federal money). In most cases, the disability organizations to which your letter refers are probably not registered political committees.

I hope that this letter has been responsive to your questions and concerns, but if it hasn't, or if I can be of any other assistance, please give me a call.

This is an informal opinion of the staff of the State Elections Board and not a formal opinion, issued pursuant to s.5.05(6), Stats., of the Elections Board, itself.

STATE ELECTIONS BOARD

George A. Dunst
Legal Counsel

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