

**CALIFORNIA COMMUNITY COLLEGES
CHANCELLOR'S OFFICE**

1102 Q STREET
SACRAMENTO, CA 95814-6511
(916) 445-8752
HTTP://WWW.CCCCO.EDU



September 16, 2004

To: Superintendents and Presidents

From: Steven Bruckman
Interim General Counsel

Subject: Use of District Resources for Partisan Purposes
Legal Advisory 04-05

Synopsis: The upcoming November elections offer an opportunity for districts to review their practices regarding the use of public resources in relationship to matters before the electorate. This advisory discusses certain basic principles which apply to campaigns for or against ballot measures (including bond measures) and to campaigns of candidates for office, such as district board of trustee elections. Applying these principles in specific situations will require a careful analysis of the facts of the particular case as well as a thorough review of the law. The System Office does not interpret or enforce the laws discussed here. We provide this information to alert districts to the issues and provide a starting point for review of local practices. Districts should consult with their own legal counsel as specific questions arise.

Use of District Resources for Partisan Purposes.

The use of district resources to support or oppose ballot measures or candidates is restricted. The fundamental reason for the restriction is that public money cannot be used for partisan activities. Put another way, resources that have been obtained for the district's support from all taxpayers must not be used "to take sides." Therefore, district employee time, equipment, supplies, or other public resources may not be used in advocating for either side of a ballot measure or to support or defeat any candidate. These restrictions are largely set out in an article in the Education Code entitled "Political Activities of School Officers and Employees" that encompasses sections 7050 through 7058.

Districts must be mindful that employees retain their constitutional rights to engage in political activities. The Education Code includes the legislative declaration that "political activities of school employees are of significant statewide concern." (Ed. Code, §7050.)¹ Nevertheless, section 7055 allows districts to establish rules and regulations concerning political activities during employee working hours and on district premises.

¹ All statutory references are to the Education Code unless otherwise indicated.

This section confirms that a district may regulate political activities of its employees on its premises without violating employee rights.² Nothing in the provisions permits districts to require or to permit employees to use paid service time to engage in partisan political action.

What employees do on their own time and using their own funds or other resources in connection with elections is their own business. Employees should certainly be encouraged to exercise their rights of citizenship and to participate in elections.³ However, district resources are not available for employee advocacy activities.

Voter Registration Activities.

Making voter registration materials available to students is not only a significant step towards supporting democratic principles, but is also a requirement for educational institutions that participate in federal student aid programs. The Higher Education Act of 1998 requires most such institutions to make a:

"good faith effort to distribute a mail voter registration form . . . to each student enrolled in a degree or certificate program and physically in attendance at the institution, and to make such forms widely available to students at the institution."
(20 U.S.C. § 1094(a)(23)(A); 34 CFR § 668.14(d)(1).)

The System Office has also urged the expansion of the Automatic Voter Registration Project to provide students with a convenient way to register to vote when registering for classes. Whether this project or other means are used to encourage students to register to vote and to vote, district efforts to have students vote in particular ways could run afoul of the laws that restrict partisan activities.

Activities Regarding Statewide or Local Campaign Measures.

Districts may draft initiative or referendum measures on an area of legitimate interest to the district. Districts may take positions on ballot measures. Public resources may also be used for *informational* efforts regarding ballot measures. Beyond the use of public resources that might be associated with these activities, public resources cannot be used to promote or to oppose such measures.

² For example, a K-12 school district relied on section 7055 when an employee displayed a large campaign sign on a private vehicle and parked in the school parking lot where it was visible to her students while in their classroom and the public. The two-by-eight-foot sign indicated which school board candidates the union endorsed and was intended to influence voters in the upcoming election. The district's request that the sign be removed or the vehicle parked off of school property was challenged as an unfair labor practice and ultimately addressed by the California Public Employment Relations Board (PERB). Under the circumstances of the case, PERB found the school's actions were allowable under section 7055. (24 PERC ¶ 31053.) Although this was a K-12 situation where education is compulsory and the pupil-instructor relationship is not between adults, the PERB nevertheless declared that the purpose of "Education Code section 7050 et seq. is to insulate schools from involvement in political controversy."

³ Employees have the right to take brief time off from work, without loss of pay, if needed to permit them to vote. (Elec. Code, § 14000.) All employers, including districts, are required to post a notice setting forth the provisions of section 14000 not less than 10 days before every statewide election. (Elec. Code, § 14001.)

The general rule appears in section 7054:

"(a) No . . . community college district funds, services, supplies or equipment shall be used for the purpose of urging the support or defeat of any ballot measure. . . .

(b) Nothing in this section shall prohibit the use of any of the public resources . . . to provide information to the public about the possible effects of any bond measure or other ballot measure. . . ."

Expenditures are allowed for informational activities if they are otherwise authorized and "[t]he information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure." (Ed. Code, § 7054(b)(2).)

The potential penalties for improper use of public resources under section 7054 are severe: county jail imprisonment for up to a year and/or a fine not exceeding \$1000 or imprisonment in state prison for up to three years.

A district may use public resources to provide a fair presentation of relevant information regarding a ballot measure; a district may not use public resources to campaign for or against a ballot measure. The boundary between "providing information" and "conducting a campaign" is not always easy to determine, and all of the facts and circumstances of the situation must be analyzed in order to reach an appropriate determination.

We believe the following language from the leading California case on the issue of the use of public resources for ballot measures is helpful:

"Problems may arise, of course, in attempting to distinguish improper 'campaign' expenditures from proper 'informational' activities. With respect to some activities, the distinction is rather clear; thus, the use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots' unquestionably constitutes improper campaign activity [citations omitted], as does the dissemination, at public expense, of campaign literature prepared by private proponents of a ballot measure. [Citations omitted.] On the other hand, it is generally accepted that a public agency pursues a proper 'informational' role when it simply gives a 'fair presentation of the facts' in response to a citizen's request for information [citations omitted] or, when requested by a public or private organization, it authorizes an agency employee to present the department's view of a ballot proposal at a meeting of such organization. [Citations omitted, fn omitted.]

Frequently, however, the line between unauthorized campaign expenditures and authorized informational activities is not so clear. Thus, while past cases indicate that public agencies may generally publish a 'fair representation of facts' relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual

information, and which have refrained from exhorting voters to 'Vote Yes,' have nevertheless been found to constitute improper campaign literature. [Citations omitted.] In such cases, the determination of the propriety or impropriety of the expenditure depends on the careful consideration of such factors as the style, tenor, and time of the publication; [fn omitted] no hard and fast rule governs every case." (*Stanson v. Mott* (1976) 17 Cal.3d 206, 221-222.)

What sorts of activities are prohibited?

The above quotation from *Stanson v. Mott* lists several obviously improper uses of public funds, e.g., the purchase of bumper stickers, posters, or media spots to support or oppose a ballot measure.

Districts may not use public resources to print and distribute information that supports or opposes a measure in a districtwide newsletter.

Districts may not direct employees to spend their working time preparing materials to support or oppose a ballot measure. Districts should curtail such activities if they become aware that employees are using their work time for such activities.

Districts may not use public resources to distribute materials prepared by non-district organizations that support or oppose ballot measures.

Districts should not authorize district auxiliary organizations or other district affiliated organizations to use district mailing labels to send out literature advocating the passage or defeat of a ballot measure. (Another question would be whether political activities are even consistent with the purposes for which the organizations were established or with their tax exempt status.)

Districts should not solicit contributions from district vendors to support or oppose measures. It could appear that public money paid to the vendor is being passed through to campaign efforts.

What sorts of activities are authorized?

Districts may take positions on ballot measures and representatives may accept invitations from community or other organizations to attend their meetings and speak about the district's position on a measure. Participation during normal work hours is permitted to describe the reasons for the district's position.⁴

However, if the district representative initiates the request to appear on the organization's agenda during working hours, presentations would have to be more balanced and neutral, explaining the facts on both sides of the issue. On the other hand, a district representative

⁴ See section 7054.1: "Nothing in this article shall be construed as prohibiting any administrative officer or board member of a school district or community college district from appearing at any time before a citizens' group that requests the appearance of the officer or board member for purposes of discussing the reasons why the governing board of the district called an election to submit to the voters of the district a proposition for the issuance of bonds and for purposes of responding to inquiries from the citizens' group."

who takes time off (such as a lunch hour or vacation day) and acts in his/her private capacity is free to make public or private appearances or statements regarding a proposition. If there is any doubt that the participation is personal, it may be advisable to make clear that the position is not being taken on behalf of the district and that no district resources are being spent in connection with the presentation.

Of course, these restrictions apply to district officials. Thus, another option is to have members of the public who are not board members or district employees make presentations to such groups.

Fundraising on behalf of or in opposition to a measure away from campus during non-working hours is acceptable. Employees still cannot use district resources -- printing, paper, supplies, etc. to prepare promotional materials.

Districts may sponsor a forum on the measure, so long as the forum is accessible on an equitable basis to groups with an opposing point of view.⁵

Activities Regarding the Election of Trustees.

Just as section 7054(a) prohibits the use of district resources to urge the support or defeat of any ballot measure, it also prohibits the use of district resources to urge the support or defeat of any candidate. Thus, persons who are seeking election as a community college trustee must refrain from using district supplies, equipment, money or facilities in connection with that election effort. District employees may not use their work time or district resources to support or oppose candidates.

What sorts of activities are authorized?

In 2002, the California Attorney General was asked whether section 7054 allows community college districts to pay for the printing, handling, translating and mailing of trustee candidate statements contained in the voter pamphlet. Elections Code section 13307 allows local agencies, including community college districts, to charge a pro rata share to candidates for the cost of printing and distributing the candidate's statement in the voter's pamphlet. The collection of a pro rata share is not required, and, at first blush, it may appear that a district that fails to collect that pro rata share is providing public funds in support of the candidates. The Attorney General reconciled the sections by noting that costs associated with the voter's pamphlets are not spent "for the purpose of urging the support or defeat of any . . . candidate" as prohibited by Education Code section 7054. Rather, the Attorney General stated

"Simply put, paying the costs of distributing all trustee candidate statements included in the voter's pamphlet cannot be said to be 'campaigning' for any particular candidate in a 'partisan' manner so as to constitute a violation of Education Code section 7054." (85 Ops.Cal.Atty.Gen. 49 (2002).)

⁵ See section 7058: "Nothing in this article shall prohibit the use of a forum under the control of the governing board of a school district or community college district if the forum is made available to all sides on an equitable basis."

The Political Reform Act of 1974 was intended to prevent potential corruption of the political process. (Gov. Code, §§ 81000 et seq.) Public officers may not expend public money in their election efforts and candidates may not accept any public money towards their election efforts. (Gov. Code, § 85300.) However, the above-referenced Attorney General Opinion concludes that the payment by a community college district of the costs associated with candidate statements did not violate section 85300. "Again, no partisan campaigning on behalf of any particular candidate may be found where public funds are being used to reproduce and distribute all candidate statements as part of the voter's pamphlet." (85 Ops.Cal.Atty.Gen. 49, *supra*.) Thus, the Attorney General concluded that community college districts may pay for printing, handling, translating, and mailing trustee candidate statements contained in voter pamphlets, provided that this is done on an equitable basis for all candidates.

Districts may offer the use of a forum under its control to afford all candidates the opportunity to present themselves. For example, a district could sponsor a "candidates' night" where all persons who are running for membership on the board of trustees have equal opportunity to discuss their views. Candidates, and persons supporting or opposing their candidacy, could also use any public district bulletin boards or free speech areas that are available for use by all candidates on an equal basis (assuming any other applicable use conditions are met, e.g., size of poster).

What sorts of activities are not authorized?

Districts should not use district mail and printing services to distribute political materials. The general rule of section 7054 (that prohibits the use of district resources to support or oppose candidates) was assessed by PERB in connection with the use of the employee mail system at the San Diego Community College District (District) to distribute publications supporting particular candidates for the District's board of trustees. The District notified its mailroom staff not to distribute "clearly political flyers urging the support or defeat of any ballot measure or candidate for election" and to remove such materials from mailboxes even if they were placed there by others. The District also ceased printing political materials for the union, even if reimbursed. The faculty union challenged the restriction as an unfair labor practice because Government Code section 3543.1(b) grants organizations the right to use employer mail facilities. Thus, PERB faced the interaction of Education Code section 7054 and Government Code section 3543.1(b) in connection with a community college board of trustee election.

PERB noted that EERA does not "supersede other provisions of the Education Code." (Gov. Code, § 3540.) It further found that:

"the mandate of Education Code section 7054 removes the policies at issue from the scope of representation to the extent that the statutory language of Section 7054 clearly evidences an intent to set an inflexible standard or insure immutable provisions." (26 PERC ¶ 33014, November 28, 2001; Union's request for reconsideration denied April 18, 2003.)

After reviewing the legislative intent of section 7054, PERB found "the District's prohibition on use of the inter-site mail system – and photocopying services, falls squarely within, and is in fact mandated by, the plain words of Section 7054." (*Ibid.*)

It appears that the same principles would also apply to use of the district email system. Thus, districts should not distribute, and should not allow others to distribute, political material advocating the support or defeat of a ballot measure or candidate via its email system.

Persons who hold office, or who are seeking election to office, may not threaten adverse consequences to district employees if they fail to support them, or promise advantages or benefits to district employees who do support them. (Ed. Code, § 7053 and Gov. Code, § 3204.)

Current district officers or employees may not solicit political contributions from other district officers or employees unless "the solicitation is part of a solicitation made to a significant segment of the public. . . ." It does not matter whether the solicitation is direct or indirect. (Gov. Code, § 3205.) An example of indirect solicitation would be supplying favored candidates with nonpublic employee lists that may then be used for the solicitation of support. Violation of the prohibition is punishable as a misdemeanor.

Candidates who are already in office are specifically restricted from using public resources for campaign activities. Civil penalties may result, up to \$1000 for each day that violations occur, plus three times the value of the public resources that were improperly used. (Gov. Code, § 8314.) Although some incidental or minimal use of public resources does not violate section 8314, the same may not be true for violations of Education Code section 7054, which does not include any express exception for incidental or minimal use.

Districts may not fund mass mailings that feature an incumbent board member.

The Political Reform Act of 1974 rejected laws and practices that unfairly favor incumbents. (Gov. Code, § 81002.) One means of preventing unfair advantages for incumbents is the prohibition on use of public funds for mass mailings that "feature" them. Thus, "no newsletter or other mass mailing shall be sent at public expense." (Gov. Code, § 89001.) A "mass mailing" consists of "over two hundred substantially similar pieces of mail" when the items feature an elected official and have not been solicited. (Gov. Code, § 82041.5; Cal Code Regs., tit 2, § 18901.)

The "mass mailing" restrictions are designed to prohibit "elected officials from using public moneys to perpetuate themselves in public office." (*Watson v. Fair Political Practices Commission* (1990) 217 Cal.App.3d 1059, 1074-75.) Section 18901 defines "mass mailings" in terms of the numbers of copies of an unsolicited mailed items, whether the items "feature" elected officers of the entity that produces or sends the mailing, and whether the mailing was prepared or sent in cooperation, consultation, coordination or concert with the elected officer. An elected officer is "featured" when:

"the item mailed includes the elected officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color." (Cal. Code Regs., tit. 2, § 18901(c)(2).)

Regardless of whether an election is imminent, districts must be careful that they do not inadvertently use public funds to send mass mailings that feature their elected board members. The regulation is fairly complex, with numerous exceptions and conditions that take it beyond the scope of this general review (e.g., the officer's name may appear in letterhead, press releases to the media, ordinary business communications between a district and other agencies or within the district, essential program mailings to program recipients – without the official's photograph, district directories that list the name and title of district individuals – again, without the official's photograph, etc.). Districts are well advised to assess their mailing practices in light of this regulation to ensure ongoing compliance.

Recommendation: No action is required; this memorandum is advisory only. However, districts should anticipate that they may receive requests for actions related to elections and ensure that they understand their obligations regarding the use of public resources concerning those elections. Districts should consult their own legal counsel before acting upon this advisory or before undertaking any significant effort to campaign or fundraise for or against ballot propositions.

SB:RB:sj