

STATE BOARD OF ELECTIONS
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Director

October 1, 2004

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Mr. J. David James
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Re: Request for Advisory Opinion pursuant to N.C. Gen. Stat. § 163-278.23 on Questions Related to the Scope of Articles 22E and 22F of Chapter 163 of the N.C. General Statutes

Dear Mr. James:

You have requested on behalf of Teamsters Local 391 and the political committee “Carolina Drive” a written opinion pursuant to N.C. Gen. Stat. § 163-278.23 on the scope of certain statutory requirements of Articles 22E and/or 22F of Chapter 163 of the North Carolina General Statutes.

You ask several questions with respect to the permissible source of funds for electioneering communications and the reporting of any funds spent on electioneering communications. First, you ask whether “only new funds raised and maintained in separate and segregate accounts, comprising only funds directly contributed by individuals” may be used for “the purchase or provision of electioneering communications pursuant to Articles 22E and 22F.” With limited exceptions, only an “individual, committee, association, or any other organization or group of individuals” may make disbursements for electioneering communications. The source of the funds used for the disbursements must be individuals and the entity making the disbursement must be able to clearly document that all funds originated from individuals.

If an entity has maintained an account that has only funds originating from individuals, those funds do not have to be “new” in the sense that they have been raised since the passage of Article 22E and 22F. General Statutes 163-278.81 and -278.91 recognize in subdivision (b)(5) that disbursements for electioneering communications may originate from a “segregated bank account that consists of funds contributed solely by individuals directly to that account for electioneering communications.” In addition, a corporation exempt from taxation under section 501(c)(4) of the Internal Revenue Code of 1986 or a political organization defined by section 527(e)(1) of the Code may make expenditures for communications paid for exclusively from funds provided by individuals and maintained in a segregated bank account without their being deemed “electioneering communications.” G.S. 163-278.82(a) & -278.92(a). But not all disbursements for electioneering communications have to originate from segregated funds. Subdivisions (b)(6) of G.S. 163-278.82(a) and -278.92(a) contemplate that there may be disbursements from funds other than segregated bank accounts, presumably by entities meeting all the criteria set forth in G.S. 163-278.19(f). Thus, when Articles 22 E and F are read as a whole, they dictate that no funds for electioneering communications may be from an account in which funds from corporations, labor unions or other prohibited sources were commingled with funds from individuals unless the entity making the disbursement for the electioneering communication fits within the narrow statutory exception for entities meeting all the criteria of G.S. 163-278.19(f).

You next ask whether the accounts in which the funds used for electioneering communications are deposited must be maintained in North Carolina. Neither Article 22E nor Article 22F imposes a requirement that the accounts be maintained in this State. In providing disclosure of disbursements for electioneering communications, the entity making the disclosure is asked to provide the name of the individual who controls the accounts for the entity making the disbursement and that individual’s mailing address, telephone number, their principal place of business or employer’s name, and their occupation. This information is requested so that the State Board has the information necessary to contact the appropriate representative of the entity making the disclosure if it has questions about the reports the entity has filed. The State Board has promulgated a reporting form for electioneering communications and it is available in editable pdf format on the State Board’s web page (www.sboe.state.nc.us/index_cfrs.html). A copy of the form and instructions is attached.

Next you ask whether “the State Board intends to apply ‘consultation and coordination standards’ drawn from the Federal Election Campaign Act as is more fully addressed in the administrative scheme promulgated by the Federal Election Commission.” As you are undoubtedly aware, on September 18, 2004, the United States District Court for the District of Columbia rejected the coordination regulations adopted by the Federal Elections Commission (“FEC”) implementing the Bipartisan Campaign Reform Act of 2002 (“BCRA”) in the case of *Shays v. FEC* (No. 02-1984(CKK)). The FEC announced on September 28 that it had voted to appeal the decision but it had “not yet determined whether it will ask the court of appeals to review all, or only some, of the rules remanded to the Commission by the district court.” (www.fec.gov) The State Board may review the evolving case law on the validity of the FEC regulations, as well as developments with respect to the statutes or regulations of other jurisdictions dealing with consultation and coordination, in order to better understand and apply North Carolina’s statutes; however, the State Board does not consider regulations adopted by another jurisdiction to be in any way binding on it.

Rather, in interpreting North Carolina’s statutes, the State Board will rely on ordinary principles of statutory construction. A fundamental principle on which it will rely is that words used in a statute will be given their common or ordinary meaning unless the General Assembly has specifically defined them. *Food Town Stores, Inc. v. City of Salisbury*, 300 N.C. 21, 265 S.E.2d 123 (1980). In addition, “in the absence of a contextual definition, [the State Board] may look to dictionaries to determine the ordinary meaning of words within a statute.” *Perkins v. Ark.Trucking Servs, Inc.*, 351 N.C. 634, 638, 528, S.E.2d 902, 904 (2000).

The term “independent expenditure” is defined in N.C. Gen. Stat. § 163-278.6(9a) in pertinent part to mean “an expenditure to support or oppose the nomination or election of one or more clearly identified candidates *that is made without consultation or coordination with a candidate or agent of a candidate* whose nomination or election the expenditure supports or whose nomination or election the expenditure opposes.” (Emphasis supplied.) The State Board will apply the common understanding of the words used in this definition to determine whether an expenditure is independent. If there is any doubt about the meaning of a word used in the definition, then the State Board may rely on a dictionary to determine the meaning of a word. In addition, if a word has been construed by a North Carolina court in an analogous context, then the meaning given the word by the court will be significant.

The purpose of an advisory opinion under N.C. Gen. Stat. § 163-278.23 is to provide an opinion to candidates, committees and others regarding compliance with the campaign reporting statutes. It is a vehicle for providing guidance on the application of the statutes to a set of facts. Whether an expenditure is “made without consultation or coordination” will of necessity be made on a case-by-case basis considering the pertinent facts under the principles set forth herein. Since your letter presents no facts to which the statutes may be applied, I am unable to provide any more definitive guidance at this time. You are encouraged in the future to request an opinion with respect to a given set of facts if you are uncertain of the application of the campaign reporting statutes to those facts.

Changes in statutes or case law may affect this opinion and you should evaluate their applicability in relying on it. This opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

Sincerely,

Gary O. Bartlett
Executive Director

cc: Julian Mann III, Codifier of Rules