LETTER OPINION
2009-L-11

July 6, 2009

The Honorable Kim Koppelman
State Representative
513 1st Avenue NW
West Fargo, ND 58078-1101

The Honorable Dan Ruby
State Representative
4620 46th Avenue NW
Minot, ND 58703-8710

The Honorable Mike Schatz
State Representative
400 9th Street East
New England, ND 58647-7528

Dear Representatives Koppelman, Ruby, and Schatz:

Thank you for your letter asking whether state agencies or entities may expend public funds or resources to advocate for or against a ballot measure. Consistent with past opinions issued by this office, it is my opinion that a state agency or entity may not use state funds or resources to advocate for or against a ballot measure, absent a constitutional or statutory provision permitting it.

ANALYSIS

In your letter you refer to recent opinions issued by this office determining that a political subdivision may not expend public funds to advocate the political subdivision's position on a ballot measure without specific legislative authority to do so.[1] You then ask whether this

[1] See N.D.A.G. 2004-L-55 (while a school district may provide the public with neutral factual information, it may not, absent a statute, expend public funds to advocate school board's position on a ballot measure); N.D.A.G. 2002-L-61 (county commission newspaper insert went beyond fair presentation of facts relating to a pending ballot measure on whether to construct a new courthouse to advocacy by the county for passage of the bond issue; expenditure of public funds for the newspaper insert advocating the county's position was inappropriate and unlawful), available online at www.ag.nd.gov. Rather than repeat the detailed analysis of those opinions, I have enclosed copies for your easy reference.

prohibition against using public funds or resources also applies to state level agencies and entities.

Initially, it should be noted that the law is clear that public funds may not be expended except for a public purpose.[2] As the North Dakota Supreme Court recently said in construing the misapplication of entrusted property statute:

> It is axiomatic that if public funds are spent illegally, without constitutional or statutory authorization, there is a clear risk of loss to the state. The people and the legislature, through the constitution and laws of this State, have delineated the parameters of the appropriate expenditure of public funds, and any expenditure in violation of those provisions by definition creates a loss to the government.[3]

One leading case has held that a state official lacks authority to expend public funds to support a state bond issue enhancing state and local facilities because, absent clear and explicit legislative authorization, a public agency may not expend public funds to promote a position in an election campaign.[4] "A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions."[5]

While a public body may not generally expend public funds to advocate a position on a ballot measure, absent some statutory or constitutional authority to do so, courts have held that public bodies have implied power to make reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching informed decisions in voting on the ballot measure.[6] As the California Supreme Court has noted:

> [I]t 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 . . . or, when requested . . . it

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[2] See State v. Blunt, 751 N.W.2d 692, 700 (N.D. 2008).
[3] Id.
[4] See Stanson v. Mott, 551 P.2d 1, 3-9 (Cal. 1976) (authorities have not drawn a distinction between a ballot measure and a candidate campaigning; the judicial decisions have uniformly held that use of public funds for campaign expenses is as improper in other non-candidate elections as in candidate elections).
[5] Mott, 551 P.2d at 9.
[6] Id. at 10-11.

> authorizes [an] . . . employee to present the [agency's] view of a ballot proposal at a [public] meeting.[7]

In addition, a trivial or de minimis use of public funds or resources would likely not be determined by the courts to constitute a violation of the law.[8] Thus, to the extent an expenditure of state funds or resources would be used only to educate the voters through a fair presentation of the facts about a pending ballot measure, no violation would occur.

Based on the foregoing, it is my opinion that a state agency or entity may not use state funds or resources to advocate for or against a ballot measure, absent a constitutional or statutory provision permitting it.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg
Enclosures

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[9]

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[7] Id. at 11-12 (citations omitted). See also N.D.A.G. 2002-L-61 (while newspaper insert by county may not promote passage of bond issue, county may offer a fair presentation of facts regarding a measure).

[8] See Saefke v. Vande Walle, 279 N.W.2d 415, 417 (N.D. 1979) (trivial or miniscule uses of public property do not rise to the level of misuse of public funds or public property for political purposes); but see State v. Blunt, 751 N.W.2d 692, 701 (N.D. 2008) (relatively small individual misuses of public funds that aggregate into larger significant amounts of public funds may constitute violation of misapplication of entrusted funds statute); see also N.D.A.G. 93-L-182 ("[w]hat constitutes a 'trivial' use of state property will depend on the facts in each particular case").

[9] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).