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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 99-150

AN ORDER to amend ElBd 1.28 (2) (c), relating to express advocacy.

Submitted by **ELECTIONS BOARD**

10-26-99 RECEIVED BY LEGISLATIVE COUNCIL.

11-22-99 REPORT SENT TO AGENCY.

RNS:RJC;jal;rv

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CLEARINGHOUSE RULE 99-150

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. Only those provisions of the current administrative code actually being amended should be replicated in the rule. Thus, s. EIBd 1.28 (1) (intro.) and (2) (intro.) should be deleted. However, the board may wish to use this rule to correct s. EIBd 1.28 (1) (intro.) to read: "As used in this section:".

b. Since the bulk of s. EIBd 1.28 (2) (c) is being added, it may be preferable to simply repeal and recreate the entire paragraph. This would remove the need for such significant underscoring. Also, each subdivision in par. (c) should end with a period, rather than a semicolon.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The cover letter to the rule submitted to the Clearinghouse asserts that there are no court decisions directly relating to the content or adoption of the rule. The analysis to the rule correctly contradicts that assertion. In addition, the Wisconsin Supreme Court case referenced can now be referred to by its reporter citations (227 Wis. 2d 650, 597 N.W.2d 721). The official caption of that case should also be reviewed and corrected in the rule as necessary.

b. The "NOTICE OF PROPOSED RULE" lists several statutory sections as authority for, or as being interpreted by, the rule. It appears that only the references to ss. 5.05 (1) (f) and

227.11 (2) (a) directly relate to the contents of the rule. The other references should be reviewed closely and changed if necessary. This same problem exists in the paragraph immediately preceding SECTION 1 of the rule, the introductory clause. In addition, that paragraph misidentifies the administrative rule sections being amended in the rule. The statutory basis for the rule, the statutes being interpreted by the rule and the administrative code provisions modified by the rule should all be reviewed carefully so accurate information is being presented to readers of the rule.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The rule's analysis is largely unhelpful in understanding the intent and impact of the rule. First, the analysis fails to put the rule changes in context. It does not explain why the rule is necessary or why the current rule is insufficient. This omission seems even more egregious when one considers that the current rule, and the statute which it interprets, also appear to be based on the holding of *Buckley*. The analysis is also silent with respect to the necessity and effect of the extension of the express advocacy tests, which the rule asserts were set forth in the two cases cited, to include the "functional equivalents" of the listed terms. As noted in the comment below, the rule's clarity with respect to the term "functional equivalents" is less than ideal. The analysis could go a long way in clarifying the term's meaning. Finally, the analysis fails to answer the question which readers of the rule will most likely want to know: How does the rule treat the types of communications like the ones at issue in the *WMC* case? Is it the board's intent to bring those types of communications within the scope of the rule, apply a case-by-case test or exclude them altogether? If this rule is a reaction to the *WMC* case, which the contents of the analysis seem to imply, it would be helpful to clarify in plain language the import and meaning of that reaction.

b. Although it is clear from the text of s. EIBd 1.28 (2) (c) that the identified list of words and phrases are not intended as an exhaustive list, the rule's clarity is considerably lessened by the use of both phrases "such as the following" and "or their functional equivalents." One might suggest that the two phrases are trying to identify the same type of terms. For example, "Vote for Smith," because it is one of the identified terms, would clearly fall under the rule. Additionally, it is presumed that the slogan "Pick Smith" would also become subject to reporting requirements because it is a term such as "vote for" and because it acts as a "functional equivalent" to "vote for." Thus, it appears that there would be no need for the use of both descriptive phrases. Since it seems the phrase "such as the following" is broad enough to include the "functional equivalents" of the terms, it could be argued that the second term is redundant and should be deleted from the rule.

Another possibility evident from the use of both phrases, however, is that something other than literal functional equivalents are intended to be included under the scope of the rule. In other words, "functional equivalent" is intended to include words and phrases that, depending on their use, serve the same function as the listed terms. Thus, the rule creates a context-based test in which communications will be reviewed to determine whether they contain terms that function like the listed terms based on factors such as the way they are used, the timing of the communications and the intended audience. Under this possible interpretation, the phrase "Let

Smith know how you feel” run on the eve of an election could be considered a functional equivalent of “Vote for Smith” or “Defeat Smith.”

Whatever the intent of the rule, however, the rule should be clarified so that the public, especially members of the public who might be subject to the rule, know the intended scope of the rule. Clarifying the rule would help to provide sufficient warning before communications are run that a context-based standard is, or is not, going to be used to determine whether the communications are subject to regulation.

c. The phrase “and that unambiguously relates to the campaign of that candidate” is somewhat confusing in light of its use as an additional criterion to determine whether or not a communication is subject to the rule. The rule requires that the triggering terms be used with reference to a “clearly identified candidate” and be used to “expressly advocate[] the election or defeat of that candidate.” Could a communication expressly advocate the election or defeat of a candidate without unambiguously relating to the campaign of that candidate while using the triggering terms? Perhaps this is additional evidence that the rule intends to use a context-based analysis. In any event, the rule’s clarity could be enhanced, possibly through an explanatory note to the rule or examples of the rule’s application to various communications, by identifying how the above phrases are intended to be interpreted in conjunction with each other.

State of Wisconsin \ Elections Board



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Chairperson

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Kevin J. Kennedy
Executive Director

October 25, 1999

Ronald Sklansky
Administrative Rules Clearinghouse
Legislative Council
1 East Main St., Suite 401
Madison, WI 53703

Re: Administrative Rules of the State Elections Board

Dear Mr. Sklansky:

Enclosed please find a Notice of Proposed Rule concerning an amended rule, (EIBd 1.28(2)(c), concerning express advocacy in public communications), that the State Elections Board has adopted and wishes to promulgate pursuant to the 30-day notice procedure under s.227.16(2)(e), Stats.

No federal rules or regulations require the adoption or repeal of this rule nor relate to the substance of the rule. No court decision directly relates to the content or adoption of this rule.

The name of the person to contact about this rule is George A. Dunst, whose telephone number is (608) 266-0136.

The agency person responsible for internally processing this rule is George A. Dunst, legal counsel for the State Elections Board.

Please process this matter at your earliest convenience. Thank you.

STATE ELECTIONS BOARD

A handwritten signature in cursive script, appearing to read "George A. Dunst".
George A. Dunst
Legal Counsel

GAD/rjd

NOTICE OF PROPOSED RULE

STATE ELECTIONS BOARD

NOTICE IS HEREBY GIVEN that pursuant to ss.5.05(1)(f), 5.93, and 227.11(2)(a), Stats., and interpreting ss.5.76, 5.77(2), 5.90, 5.91, 5.92, and 7.23, Stats. and according to the procedure set forth in s.227.16(2)(e), Stats., the State of Wisconsin Elections Board will adopt the following rule as proposed in this notice without public hearing unless within 30 days after publication of this notice, the Elections Board is petitioned for a public hearing by 25 persons who will be affected by the rule; by a municipality which will be affected by the rule; or by an association which is representative of a farm, labor, business, or professional group which will be affected by the rule.

ANALYSIS PREPARED BY STATE ELECTIONS BOARD:

Statutory authority: s.5.05(1)(f), s.5.93 and s.227.11(2)(a), Stats.

Statutes interpreted: ss. 11.01(3), (6), (7) and (16), and ss.11.05, 11.25, 11.29, 11.30, 11.36, Stats.

This amended rule interprets ss.11.01(3), (6), (7) and (16), and ss.11.05, 11.25, 11.29, 11.30, 11.36, Stats. The amendment attempts to define more specifically those communications that are considered to be express advocacy subject to regulation by ch.11 of the Wisconsin Statutes. The rule codifies the express advocacy test set forth by the U.S. Supreme Court in 1976, in Buckley v. Valeo, 424 U.S. 1, and reiterated in 1999 by the Wisconsin Supreme Court in WMC IMC, Inc. v. State Elections Board, (Case No.98-0596), by establishing a nonexclusive list of terms that are considered to expressly advocate. The rule also extends express advocacy to the functional equivalents of those terms.

Pursuant to the authority vested in the State of Wisconsin Elections Board by ss.5.05(1)(f), 5.93, and 227.11(2)(a), Stats., the Elections Board hereby creates Rule EIBd 7.01, 7.02 and 7.03 interpreting ss.5.76, 5.77(2), 5.90, 5.91, 5.92, and 7.23, Stats., as follows: } old

SECTION 1. EIBd 1.28(2)(c) is amended to read:

EIBd 1.28 Scope of regulated activities; election of candidates (1) ✓
Definitions. As used in this rule: ...

(2) Individuals other than candidates and committees other than political committees are subject to the applicable disclosure-related

and recordkeeping-related requirements of ch. 11, Stats., only when they:

(c) Make expenditures for the purpose a communication containing terms (such as the following) or their functional equivalents with reference to a clearly identified candidate that expressly advocating advocates the election or defeat of an identified that candidate and that unambiguously relates to the campaign of that candidate:

1. "Vote for;"
2. "Elect;"
3. "Support;"
4. "Cast your ballot for;"
5. "Smith for Assembly;"
6. "Vote against;"
7. "Defeat;"
8. "Reject."

INITIAL REGULATORY FLEXIBILITY ANALYSIS:

The creation of this rule does not affect business.

does it affect anyone?

FISCAL ESTIMATE:

The creation of this rule has no fiscal effect.

CONTACT PERSON:

George A. Dunst
Legal Counsel, State Elections Board
132 E. Wilson St., P. O. Box 2973
Madison, WI 53701-2973; Phone 266-0136

The creation of this rule will take effect on the first day of the month following its publication in the Wisconsin Administrative Register pursuant to s.227.22(2), Stats.

Dated October 25, 1999

intro

KEVIN J. KENNEDY
Executive Director

WISCONSIN ADMINISTRATIVE CODE

STATE ELECTIONS BOARD

SECTION 1. EIBd 1.28(1)(intro.) is amended to read:

EIBd 1.28 Scope of regulated activities; election of candidates

(1) Definitions. As used in this ~~rule~~ section:

SECTION 2. EIBd 1.28(2)(c) is repealed and recreated to read:

(2) Individuals other than candidates and committees other than political committees are subject to the applicable disclosure-related and recordkeeping-related requirements of ch.11, Stats., only when they:

(c) Make a communication containing terms such as the following or their functional equivalents, with reference to a clearly identified candidate, that expressly advocates the election or defeat of that candidate and that unambiguously relates to the campaign of that candidate:

1. "Vote for."
2. "Elect."
3. "Support."
4. "Cast your ballot for."
5. "Smith for Assembly."
6. "Vote against."
7. "Defeat."
8. "Reject."

SENATOR JUDITH B. ROBSON
CO-CHAIR
P.O. BOX 7882
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(608) 266-2253



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIR
P.O. BOX 8952
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(608) 264-6486

**JOINT COMMITTEE FOR
REVIEW OF ADMINISTRATIVE RULES**

May 11, 2000

Mr. Kevin Kennedy
Executive Director, Elections Board
132 East Wilson Street
Madison, Wisconsin

BY INTER-D MAIL

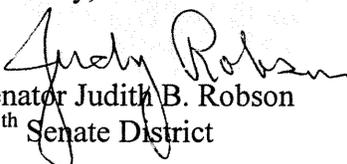
Re: Clearinghouse Rule 99-150

Dear Mr. Kennedy:

We are writing to inform you that the Joint Committee for the Review of Administrative Rules (JCRAR) held an executive session on May 10, 2000. At that meeting, the JCRAR took executive action on Clearinghouse Rule 99-150, relating to express advocacy. The committee approved introduction of LRB 4934/2 to uphold its April 11, 2000 objection to the proposed rule. The committee approved the motion on an 8 to 2 vote.

A copy of the bill draft is enclosed for your reference.

Sincerely,


Senator Judith B. Robson
15th Senate District


Representative Glenn Grothman
59th Assembly District

Enc.

JBR:GG:da

magic words

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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

Motion Form

Last Modified September 1999

Date 5/10/00 Location 201 SE

Moved by Welch, Seconded by Grothman

THAT, pursuant to § 227.19(5)(e), *Wisconsin State Statutes*, the Joint Committee for the Review of Administrative Rules approves introduction of LRB 4897 in support of its April 11, 2000 objection to Clearinghouse Rule 99-150.

COMMITTEE MEMBER	Aye	No	Absent
1. Senator ROBSON		✓	
2. Senator GROBSCHMIDT		✓	
3. Senator SHIBLISKI		✓	
4. Senator WELCH	✓		
5. Senator DARLING SCHULTZ		✓	
6. Representative GROTHMAN	✓		
7. Representative GUNDERSON	✓		
8. Representative SERATTI		✓	
9. Representative KREUSER		✓	
10. Representative BLACK		✓	
Totals			

*polled by telephone

Motion Carried Motion Failed