

**STATE OF COLORADO**

**Department of State**

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October 28, 2003

Mr. Scott E. Gessler, Esq.  
Mr. Richard W. Daily, Esq.  
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1430 Wynkoop Street  
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Denver, Colorado 80202

Re: Advisory opinion concerning contributions and expenditures by corporations and labor organizations in connection with local school board elections

Dear Sirs:

I am writing in response to your inquiry dated September 17, 2003 in which you requested a formal opinion concerning contributions and expenditures by corporations and labor organizations in connection with local school board elections. Please be advised that this opinion is advisory only, and that it is limited to the facts presented.

*Question presented:*

May corporations and labor organizations (1) contribute to local school board candidates, or (2) make expenditures expressly advocating the election or defeat of school board candidates, given that school board candidates do not seek office in a home rule county or municipality?

*Answer:*

For the reasons that follow, it is my opinion that the answer is "No". Except for local public offices in certain home rule counties or home rule municipalities, Section 3 (4) of Article XXVIII and Rule 27.2 of the Secretary of State's "Rules Concerning Campaign and Political Finance" prohibit contributions and expenditures by corporations and labor organizations for candidates for office in local elections, including school board elections. A candidate that has received such a contribution must return it to the contributor.

Discussion:

The prohibition on contributions and expenditures by corporations and labor organizations is contained in Section 3 (4) of Article XXVIII, as follows:

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**Section 3. Contribution limits.**

(4) (a) It shall be unlawful for a corporation or labor organization to make contributions to a candidate committee or a political party, and to make expenditures expressly advocating the election or defeat of a candidate; except that a corporation or labor organization may establish a political committee or small donor committee which may accept contributions or dues from employees, officeholders, shareholders, or members.

(b) The prohibition contained in paragraph (a) of this subsection (4) shall not apply to a corporation that:

(I) Is formed for the purpose of promoting political ideas and cannot engage in business activities; and

(II) Has no shareholders or other persons with a claim on its assets or income; and

(III) Was not established by and does not accept contributions from business corporations or labor organizations.

(Emphasis added.)

Thus, except as provided in paragraph (4)(b), section 3 (4) imposes two prohibitions on corporations and labor organizations:

- (1) Making contributions to a “candidate committee”, and
- (2) Making expenditures expressly advocating the election or defeat of a “candidate”.

In order to determine whether these prohibitions apply to local elections, it is necessary to examine the definitions of the four key terms used in these prohibitions:

- “candidate”
- “candidate committee”
- “contribution”
- “expenditure”

Section 2 of Article XXVIII defines “candidate” to include a person who seeks public office in any local election, including a school district election, as follows:

**Section 2. Definitions.** For the purpose of this article and any statutory provisions pertaining to campaign finance, including provisions pertaining to disclosure:

(2) "Candidate" means any person who seeks nomination or election to any state or local public office that is to be voted on in this state at any primary election, general election, school district election, special district election, or municipal election. . . . (Emphasis added.)

Article Section 2 defines the term “candidate committee” in terms of “candidate”, and therefore the term “candidate committee” includes a local candidate committee, as follows:

**Section 2. Definitions.**

(3) "Candidate committee" means a person, including the candidate, or persons with the common purpose of receiving contributions or making expenditures under the authority of a candidate. . . . (Emphasis added.)

The other key terms are defined in terms of “candidate” or “candidate committee”, as follows:

**Section 2. Definitions.**

(5) (a) "Contribution" means:

(I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, small donor committee, or political party;

(II) Any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party;

(III) The fair market value of any gift or loan of property made to any candidate committee, issue committee, political committee, small donor committee or political party;

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.

\* \* \* \*

(8) (a) "Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. . . .

\* \* \* \*

Reading all of these provisions together leads to the conclusion that the prohibitions imposed on corporations and labor organizations in Section 3(4)(a) apply to local elections, including school district elections. First, Section 3(4)(a) prohibits contributions by corporate and labor organization to a "candidate committee", and such prohibition clearly applies to contributions to local candidate committees. Second, Section 3(4)(a) prohibits expenditures expressly advocating the election or defeat of a "candidate", and such prohibition clearly applies to expenditures advocating the election or defeat of local candidates.

For these reasons, it is my opinion that Section 3 (4) of Article XXVIII prohibits corporations and labor organizations from making contributions and expenditures in connection with local elections, including school board elections.

Based on this analysis, I adopted Rule 27.2 of the Secretary of State's "Rules Concerning Campaign and Political Finance" (8 CCR 1505-6), as follows:

27.2 The provisions of Section 3 (4) of Article XXVIII of the State Constitution relating to contributions and expenditures of corporations and labor unions apply to elections to every state and local public office, except local public offices in home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address any of the matters covered by Article XXVIII or Article 45.

Rule 27.2 states the general rule that the prohibitions on contributions and expenditures by corporations and labor organizations apply in elections for local offices as well as elections for state offices.

Rule 27.2 also states an exception for certain home rule counties and municipalities. This exception obviously does not apply to school board elections, which is the subject of your inquiry.



Nevertheless, it may be useful to discuss the home rule exception further, since it provides an opportunity to address an apparent conflict between Rule 27.2 and an opinion of the Attorney General.

The home rule exception is explained in Formal Opinion No. 03-1 of Attorney General Ken Salazar, No. 03-1 issued on January 13, 2003. As the Opinion notes, it was issued at the request of the Secretary of State for guidance concerning “how the rules in the initiative [Amendment 27, which enacted Article XXVIII] apply to elections in home rule counties and municipalities. The Opinion analyzes the constitutional provisions that authorize home rule powers for counties and municipalities, as well as section 1-45-116, C.R.S., of the Fair Campaign Practices Act, concerning home rule counties and municipalities. The Opinion concludes that, “For the reasons described, Article XXVIII does not apply to home rule counties and municipalities which have charters or ordinances that already address the matters covered in Article XXVIII.”

However, the Opinion’s conclusion adds the following statement, “Also, the prohibition in Section 3(4)(a) of Article XXVIII, limiting corporate or labor organization contributions, does not apply to candidates for local offices.”

This conclusion appears to be based solely on a statement that appeared in the Legislative Council’s 2002 pre-election ballot analysis (the “Blue Book”), as follows:

Corporations and labor unions are already banned from directly contributing to federal candidates; this proposal simply extends the ban to state races.

The opinion apparently infers from this statement that Amendment 27 intended to extend the ban only to “state races”, which apparently excludes “local races”.

Although the Blue Book may be useful in interpreting a constitutional amendment because it provides the equivalent of the legislative history of a proposed amendment, it is not controlling over the actual language of the measure itself. See, *Macravey v. Hamilton*, 898 P.2d 1076, 1079 (Colo. 1995); *Bd. of County Comm'rs v. City & County of Broomfield*, 62 P.3d 1086, 1089 (Colo. App. 2002).

The opinion’s analysis does not address the definitions of “candidate” and “candidate committee” in Article XXVIII. As noted earlier, these definitions expressly include candidates and committees involving local offices, which is the basis for my opinion that the prohibition in Section 3 (4) on corporate and labor union contributions to “candidate committees” and expenditures relating to “candidates” extends to local elections.

To the extent that there may be a conflict between Rule 27.2 and Opinion 03-1, it is my opinion that Rule 27.2 is controlling. An opinion of the Attorney General is entitled to respectful consideration, but it does not have the force and effect of law.<sup>1</sup> Rule-making by an

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<sup>1</sup> “Section 24-31-101(1)(b), 10 C.R.S. (1982), requires the Attorney General to give an opinion in writing upon all questions of law submitted by the Secretary of State. Since the Attorney General’s opinion is issued pursuant to statutory duty, the opinion is obviously entitled to respectful consideration as a contemporaneous interpretation of the law by a governmental official charged with the responsibility of such interpretation. . . . A court’s resolution of an issue of statutory construction, however, must proceed from an independent analysis

administrative agency in accordance with law is a quasi-legislative act, and “Any challenging party has a heavy burden to establish invalidity of the rule by demonstrating that the agency violated constitutional or statutory law, exceeded its authority, or lacked a basis in the record for the rule.” *Colorado Ground Water Comm'n v. Eagle Peak Farms*, 919 P.2d 212, 216-17 (Colo. 1996).

Rule 27.2 was adopted on March 24, 2003, after the Attorney General issued Opinion 03-1. The Attorney General approved the rule on April 3, 2003 pursuant to 24-4-103 (8) (b), C.R.S.

Subsequently, the General Assembly enacted House Bill 03-1132<sup>2</sup>, which amended section 1-45-116, C.R.S., in a manner consistent with Rule 27.2, as follows:

**1-45-116. Home rule counties and municipalities.** Any home rule county or municipality may adopt ordinances or charter provisions with respect to its local elections which THAT are more stringent than any of the provisions contained in this Act. Any home rule county or municipality which adopts such ordinances or charter provisions shall not be entitled to reimbursement pursuant to subsection 1-45-112 (2). THE REQUIREMENTS OF ARTICLE XXVIII OF THE STATE CONSTITUTION AND OF THIS ARTICLE SHALL NOT APPLY TO HOME RULE COUNTIES OR HOME RULE MUNICIPALITIES THAT HAVE ADOPTED CHARTERS, ORDINANCES, OR RESOLUTIONS THAT ADDRESS THE MATTERS COVERED BY ARTICLE XXVIII AND THIS ARTICLE.

For all of these reasons, it is my opinion that Rule 27.2 is controlling to the extent it may be inconsistent with Opinion 03-1.

Conclusion:

It is my opinion that Section 3 (4) of Article XXVIII and Rule 27.2 of the Secretary of State’s “Rules Concerning Campaign and Political Finance” prohibit contributions and expenditures by corporations and labor organizations for candidates for office in all local elections, except for elections for office in certain home rule counties or home rule municipalities. Therefore, corporations and labor organizations may not (1) contribute to local school board candidates or (2) make expenditures expressly advocating the election or defeat of school board candidates. Furthermore, any candidate that has received such a contribution must return it to the contributor.

I hope that you will find this response helpful. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,



Donetta Davidson  
Secretary of State

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of the statutory scheme, as must our interpretation of the Campaign Reform Act in this case. *Colorado Common Cause v. Meyer*, 758 P.2d 153, 159 (Colo. 1988) (citations omitted).

<sup>2</sup> Session Laws of Colorado 2003, chapter 339.