

BEFORE THE ALASKA PUBLIC OFFICES COMMISSION
ANCHORAGE

Kraft,)	
	}	
Complainant,	}	
v.	}	Case No. 08-14-CD
State of Alaska	}	
Department of Natural Resources (DNR),	}	
	}	
Respondents.)	

DECISION AND ORDER

Brian Kraft filed a complaint before the APOC alleging that the State Department of Natural Resources website discussing Ballot Measure 4, the Clean Water Initiative, which was on the August 2008 statewide ballot, violated AS 15.13.145 and AS 15.13.040 because it did not provide a neutral explanation. The issues concerning the Department of Natural Resources website have been resolved, but one issue remains -- Kraft's assertion that Governor Sarah Palin's comment about Ballot Measure 4 violated AS 15.13.145.

Governor Palin held a press conference on August 20, 2008, which did not concern Ballot Measure 4. Near the end of the press conference, the Governor was asked whether she would vote for Ballot Measure 4. Governor Palin responded:

Let me take my Governor's hat off just for a minute, here, and tell you, personally, Prop 4, I vote no on that. I have all the confidence in the world that the Department of Environmental Conservation and our Department of Natural Resources have great, very stringent regulations and policies already in place. We're going to make sure that mines operate only safely, and soundly.

Kraft alleged that the Governor's statement violated AS 15.13.145(b), which restricts the use of state money to influence the outcome of an election on a ballot proposition, unless funds have been specifically appropriated for that purpose. The Commission directed the parties to submit

additional briefing on this part of Kraft's complaint, and both parties have done so. Oral argument was conducted before the Commission on April 23, 2009.

On April 25, 2009, Kraft filed a motion to supplement the record regarding the ballot measure opponents' use of the Governor's official photograph in an advertisement that appeared in the Anchorage Daily News on August 25, 2008. The State opposed the motion on April 27, 2009. The Commission granted the motion. On May 4, 2009, the State filed a response to the motion and answered several questions requested by the Commission concerning whether the State authorized the use of the Governor's photo. Kraft filed a reply on May 5, 2009.

The issue presented in this dispute is whether the State violated AS 15.13.145. Specifically, whether the Governor violated AS 15.13.145 by making a statement in opposition to a ballot measure, when the Legislature did not authorize an expenditure of State funds to influence the outcome of the ballot measure.

We begin with a discussion of the relevant statute, AS 15.13.145. That section prohibits State entities, municipalities, school districts, regional educational attendance areas, and any officer or employees of those entities, from using "*money held by the entity*" to influence the outcome of an election of a candidate to a state or municipal office. AS 15.13.145(b) allows use of money held by one of the entities previously described (excluding officers or employees of those entities) to influence the outcome of an election concerning a ballot proposition "*if the funds have been specifically appropriated for that purpose by state law or a municipal ordinance.*" If funds have not been appropriated to influence the outcome of a ballot proposition, subsection (c) authorizes money to be used "*to provide the public with nonpartisan information about a ballot proposition or question*" Subsection (d) requires that an expenditure of money authorized by subsections (b) and (c) "*shall be reported to the commission....*"

Subsections (a), (b) and (c) of AS 15.13.145 use the term "money held" in describing how state or public money "may be used." But subsection (d) uses the phrase "expenditure of money" when referring to how money may be used on ballot propositions. An "expenditure" is defined in the statute as including, "a transfer of money or anything of value, . . .for the purpose of . . . (iv)

influencing the outcome of a ballot proposition or question." AS 15.13.400(6)(A)(iv).

The legislature did not appropriate funds to influence the vote on Ballot Measure 4, but did appropriate funds to educate the public. Other than the money spent for the DNR website, which was the original subject of Kraft's complaint, no state money was spent directly to influence the outcome of Ballot Measure 4.

Although the statute regulates the spending of state money on ballot propositions, it does not address whether public officials may express an opinion on a ballot proposition. Thus, if the Governor's response to a question at a press conference did not entail an expenditure of state money, there was no violation of AS 15.13.145. Kraft argues, however, that the Governor was on the state payroll at the time of her comment, and thus state money – her salary -- was used to influence to outcome of a ballot proposition. Therefore, he argues, the Commission has the authority to order the Governor to stop publicly expressing an opinion on a ballot proposition, just as the Commission was authorized to order a change in the state's website after finding that the description of the ballot proposition was not neutral.

Kraft's argument is based on the definition of "expenditure" in AS 15.13.400(6), which includes "a purchase or transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value" for the purpose of "influencing the outcome of a ballot proposition or question." The argument is that the Governor's statement provided something of value to the opponents of the Ballot Measure 4 because it aided their efforts to persuade the voters to reject it.

We do not find Kraft's argument persuasive because the Governor's statement did not require the state to spend any money. The state would have spent the same amount of money for the Governor's salary (and other state expenses associated with the press conference) when she expressed her opinion on Ballot Measure 4, after the press conference was over. Even if it were possible to calculate the portion of the Governor's salary (and other state expenses) that should be attributed to the few seconds it took for the Governor to make her comments, that expenditure of state funds would be *de minimus*.

The Complainant also argues that the state gave something of value to the opponents of the ballot measure by allowing them to use the Governor's official photograph in an advertisement in the Anchorage Daily News. See Exhibit G. However, the evidence shows that the state did not authorize the use of the Governor's photograph in the advertisement, and the Governor's official photograph is easily obtainable on the Internet. Moreover, the evidence shows that based on the advice from the Attorney General, the Palin administration has never taken steps at any time to restrict the unauthorized use of the official photograph. Thus, there is insufficient evidence to prove the unauthorized use of the Governor's photograph here constituted an "expenditure" by the state in violation of AS 15.13.145.

Our decision is also based on a previous Commission advisory opinion that determined a public official's statement regarding a ballot proposition does not run afoul of AS 15.13.145, if it is made as part of the official's "usual and customary duties." As we explained in Advisory Opinion 99-03-CD (June 9, 1999),

In the case of a public official corresponding with his or her constituents about a ballot proposition, it is difficult to distinguish between an official's intent to influence a public vote and his or her duty to promote the public interest. . . .

If the action is part of an official's usual and customary duties, like responding to constituent inquiries or answering questions at a press conference, the presumption is that the action is primarily intended to satisfy the official's duties to the public and not to influence the outcome of the election. As a result, the action is not covered by the campaign disclosure law.

Here, the Governor's statement was made in response to a question at a press conference, and we presume, absent contrary evidence, that she spoke as part of her usual and customary duties – not to influence the outcome of the election.

The Commission also is concerned with the free speech implications of a ruling that attempts to regulate what the Governor can say. We are mindful of the principle of law that, if possible, a statute should be interpreted in a way that will avoid the danger of unconstitutionality. *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 192 (Alaska 2007). Interpreting AS 15.13.145 as prohibiting the Governor from expressing her opinion on a ballot measure risks running afoul of the

constitutional right of free speech. The Governor, like other citizens, has a right to express her opinion on matters of public concern. *Id.* at 202-203; *Thomas v. Hickel*, 947 P.2d 816, 821 (Alaska 1997). Our interpretation of the statute avoids the risk of unconstitutionality.

For all of the foregoing reasons, we rule that Governor Palin's press conference comment about how she would vote on Ballot Measure 4 did not violate AS 15.13.145. Further, we find that the State did not violate AS 15.13.145 because an unauthorized copy of the Governor's official portrait was used in an advertisement opposing Ballot Measure 4.

By Order of the Alaska Public Offices Commission

Dated this 8th day of May, 2009, in Anchorage, Alaska.

AFFIDAVIT OF SERVICE

DISTRIBUTION

I certify that I served the following parties by fax and mail on May 8, 2009:

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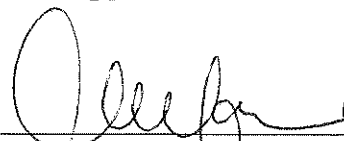
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