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HENRY MCMASTER
ATTORNEY GENERAL

July 5, 2006

The Honorable Catherine C. Ceips
Member, House of Representatives
1207 Bay Street
Beaufort, South Carolina 29902

Dear Representative Ceips:

We received your letter requesting an opinion on behalf of Randolph Bates regarding "the offering of incentives in exchange for voting." Attached to your request we found a letter addressed to you from Mr. Bates. In his letter, Mr. Bates stated as follows:

> The Beaufort County School District had a special bond referendum election held on 20 May 2006 . . . .
>
> On Sunday, 14 May 2006, the Chick-fil-A in Bluffton ran an advertisement in Bluffton Today stating: "Chick-fil-A wants you to vote! Wear your I voted sticker to our store May 20th and receive a free Chick-fil-A sandwich." . . . . Voters receive an "I Voted" sticker after voting in any election . . . .
>
> The Bluffton Today, in a story three days later noted: "Keith Clark, operator of Bluffton Chick-fil-A, will give a free Chick-fil-A sandwich to anyone who votes on Saturday and wears their "I Voted" sticker into the store from 10:30 a.m. to 10 p.m." . . . . Voters could only cast a ballot for or against the referendum question.
>
> On Saturday, May twentieth, the Chick-fil-A store in Bluffton was distributing sandwiches to voters wearing the "I Voted" sticker. The store also promoted this by placing a sign on the door to the restaurant.

Based on this information, Mr. Bates inquires as to whether "the offering of an incentive to vote, as evidenced by the Chick-fil-A advertisement, contrary to state law?" Additionally, Mr. Bates inquires as to "the legality of a candidate for office employing a similar promotion."

Request Letter

Law/Analysis

In Mr. Bates' letter, he alluded these "incentives for voting" may be in violation of section 7-25-50 or section 7-25-60 of the South Carolina Code. Section 7-25-50 makes it unlawful for an individual to bribe or accept a bribe in exchange for a vote. S.C. Code Ann. § 7-25-50 (Supp. 2005).

> It is unlawful for a person to procure, by the payment, delivery, or promise of money or other article of value, another to vote for or against any particular candidate or measure at any election held within this State, whether general, special, or primary, for members of the Congress of the United States, members of the General Assembly of this State, sheriff, clerk, judge of probate or other county officer, mayor, and aldermen of any city or intendant and wardens of any incorporated town, or at any other election held within this State. It is also unlawful for a person to accept such procurements. The person promising and the person voting are each guilty of a felony and, upon conviction, for the first offense, must be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not more than five years. Upon conviction for a second or subsequent offense, the person must be fined not less than five hundred dollars nor more than five thousand dollars and imprisoned not more than ten years.

Id. (emphasis added). Section 7-25-60 of the South Carolina Code (Supp. 2005) makes it unlawful to procure or offer to procure votes by bribery.

> (A) It is unlawful for a person at any election to:
>
> > (1) procure, or offer or propose to procure, another, by the payment, delivery, or promise of money or other article of value, to vote for or against any particular candidate or measure; or
> >
> > (2) vote, offer, or propose to vote for or against any particular candidate or measure for the consideration of money or other article of value paid, delivered, or promised, vote or offer or propose to vote for or against any particular candidate or measure.

> (B) A person who violates the provisions of this section is guilty of a felony. Upon conviction for a first offense, the person must be fined in the discretion of the court and imprisoned not more than five years. Upon conviction for a second or subsequent offense, the person must be fined in the discretion of the court and imprisoned not more than ten years.

S.C. Code Ann. § 7-25-60 (emphasis added).

In our research , we were unable to find any South Carolina case law interpreting section 7-25-50 or section 7-25-60 of the South Carolina Code. Thus, to determine whether offering the incentives described in Mr. Bates' letter are prohibited by these provisions, we look to the rules of statutory interpretation. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). As our Supreme Court declared in State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002), "Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Because sections 7-25-50 and 7-25-60 are penal in nature, we also note, courts "are bound to construe a penal statute strictly against the State and in favor of the defendant." Id.

In a plain reading of sections 7-25-50 and 7-25-60 and in light of the strict construction these statutes must be given, we believe these provisions require the vote procured by giving something of value must be for or against a "particular candidate or measure" in order to be illegal. Stated another way, for an individual to be found in violation of either of these sections, the vote must be procured in an effort to gain a vote for or against a particular candidate or measure. Only a court may determinatively decide whether Chick-fil-A intended to procure votes in favor or against the referendum. Op. S.C. Atty. Gen., March 28, 2006. However, Mr. Bates did not indicate, and no other indication is given by your letter, that in order to receive a free sandwich, the individual must vote in a particular way for or against the proposed referendum. The scenario described by Mr. Bates simply indicates the person is entitled to receive the free sandwich upon proof that he or she voted by wearing his or her "I Voted" sticker. Accordingly, while the ultimate decision must be left to the courts, in our opinion offering Chick-fil-A sandwiches to persons wearing an "I Voted" sticker does not violate sections 7-25-50 or 7-25-60 of the South Carolina Code.

In addition to examining voting incentives under sections 7-25-50 and 7-25-60 of the South Carolina Code, we also reviewed this type of activity in light of other provisions under title 7 of the South Carolina Code, the "South Carolina Election Law" (the "Election Law"). We found no provision under the Election Law specifically prohibiting the use of incentives to encourage voting. Furthermore, in a prior opinion of this Office addressing whether a list of nonvoters may be obtained for the purpose of calling such persons and encouraging them to vote, then Attorney General Daniel

R. McLeod stated: "I see no valid objection to such a practice if properly performed. There is nothing wrong with attempting to encourage people who have not voted to come to the polls and vote." Op. S.C. Atty. Gen., June 5, 1970.

While we were unable to locate a South Carolina case dealing with voting incentives, the Alaska Supreme Court, in Dansereau v. Ulmer, 903 P.2d 555 (Alaska 1995), considered whether a transportation assistance program sponsored by North Slope Borough violated an Alaska statute prohibiting a person from paying another person to vote for a particular candidate or proposition. That Court determined:

> Although AS 15.56.030(a)(2) prohibits a person from paying another person to vote for a particular candidate, proposition, or question, no Alaska Statute prohibits a person from compensating another person for voting per se. See AS 15.56.030. Thus, assuming the Borough's program paid voters with fuel to vote in the election, regardless of the amount of fuel the voters used to reach the polls, the program would not be a corrupt practice as defined by Alaska law, unless the offers of payment were made with the intent "to induce the person to vote for or refrain from voting for a candidate at an election." AS 15.56.030(a)(2).

Id. at 561. The Court found "there was no evidence the program as conducted was not candidate-neutral." Id. at 566. Thus, the Court held:

> As written, the statute does not prohibit payment to induce persons to vote who would not otherwise vote, so long as they are not induced to vote in a particular manner. If a program is candidate-neutral in fact, we must presume voters, in the sanctity of the voting booth, will vote as they would have had they made their ways to the polls without assistance or inducement.

Id. The text of the Alaska statute considered in Dansereau differs from sections 7-25-50 and 7-25-60. However, we believe a court would view them similarly. Thus, this decision further supports our belief that the Election Law does not prohibit the act of providing incentives to vote, so long as such incentives do not induce voters to vote for a particular candidate or measure.

Furthermore, presuming a court were to find the voting incentives described in Mr. Bates' letter in violation of section 7-25-50, section 7-25-60, or another provision of the Election Law, such a violation may not invalidate the referendum. Our Supreme Court announced in Taylor v. Town of Atlantic Beach Election Commission, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005):

> We will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity.

(citations omitted).

Accordingly, in addition to finding Chick-fil-A's activities in violation of the Election Law, a court must find such activities changed or rendered the outcome of the referendum doubtful. This determination requires an examination of the facts and thus, is beyond the scope of an opinion of this Office. See, Op. S.C. Atty. Gen., March 28, 2006 (stating "only a court and not this Office in an opinion may make factual determinations."). See also, Op. S.C. Atty. Gen., December 23, 2003 (finding "a court ultimately would need to determine factually the extent to which voters were influenced by the information provided prior to the referendum and whether that information constituted a material misrepresentation."); Op. S.C. Atty. Gen., May 8, 2003 ("A court ultimately would need to determine factually the extent to which voters were influenced by the information provided on the Web Site and whether that information constituted a material misrepresentation . . . ."). However, in our review of the facts presented by Mr. Bates, Chick-fil-A does not appear to induce an individual to vote a particular way in the referendum, but simply seeks to encourage people to vote. Therefore, we do not believe these activities would change or render the outcome of the referendum doubtful.

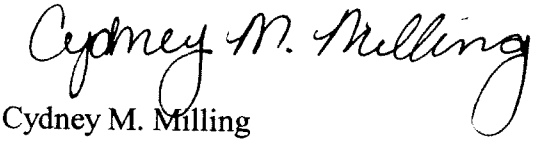
In addition to requesting an opinion as to whether Chick-fil-A may properly provide free sandwiches to voters, Mr. Bates also inquires as whether "it would be permissible for a candidate to place and advertisement or promote the offering or food, beverage, or anything else of value to voters wearing an 'I Voted' sticker?" Assuming the candidate did not ask or require voters to vote for him or her in order to receive the such an offer, per our analysis above, we presume these activities by a candidate would not violate the Election Law. However, because the candidate, not a third party, is making such an offer, a court likely would scrutinize the facts of such a situation to ascertain that the candidate's activities are not aimed at the procurement of a vote for that candidate. However, again we note, such determinations are factual in nature and thus, a court, not this Office, must decide them. Op. S.C. Atty. Gen., March 28, 2006.

Conclusion

Based on our review of the Election Law, in particular sections 7-25-50 and 7-25-60, we find no statute prohibiting the use of incentives, such as those described in Mr. Bates' letter, to encourage voting, so long as they do not encourage a person to vote in a particular manner. Furthermore, we

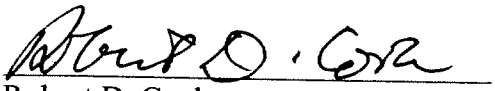
also did not discover a prohibition on the use of such incentives by candidates. However, we presume a court would likely scrutinize such activities to insure the incentives are not being provided in exchange for a vote for a particular candidate.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General