

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: March 3, 2011
TO: Interested parties
FROM: Kevin J. Kennedy
SUBJECT: Circulation of recall petitions

You have asked a number of questions about the circulation of recall petitions. The statutes the Government Accountability Board administers address only some of your questions. Those applicable statutes are ss.9.10 (2), 11.36, 19.45, and 19.59, stats. But we will attempt to provide some guidance on all of your questions. This memorandum reflects the thinking of the Board's staff and is not a formal opinion of the Board.

Asking government employees to sign a recall petition. Section 11.36, stats., prohibits any person from soliciting a political service from a state employee while the employee is engaged in official duties. Section 11.36, stats., prohibits soliciting a political service of a local government employee during established hours of employment or while the employee is engaged in official duties. This means that no one should ask a government employee to sign a recall petition during the employee's work hours.

Government employees circulating recall petitions. Section 19.45, stats., prohibits *state public officials* from using their office for a private or unlawful benefit. Circulating a recall petition is not government business – it is a private endeavor. A state public official, such as a legislative aide, who is engaged in such activity while being paid on state time, would run afoul of the Ethics Code's prohibition. Section 19.59, stats. applies similar restrictions to *local public officials*. However, the vast majority of state and local employees are not defined as public officials and are not subject to the statutory ethics codes.

We have reviewed ER-MRS ch. 24, the code of ethics for state employees who do not qualify as state public officials, and have not found any provision that addresses state employees circulating recall petitions, nomination papers, or the like on state time. I am unaware of any statutes that prohibit a local government employee from circulating a recall petition while the employee is at work. Such activities may be regulated by personnel policies and work rules, or a local ethics code, but are not prohibited by the civil or criminal statutes governing campaigns or elections or by the ethics code for local public officials found in section 19.59, stats. In our view, it would seem appropriate to restrict any activity by an employee that disrupts the workplace or permits an employee to take advantage of his or her position to obtain signatures. Also, as a matter of general principle, public employees should not be engaged in private endeavors while on work time, including circulating recall petitions. But any disciplinary consequences would be up to the employing authority; it is not an issue of enforcement under the statutory code of ethics for local public officials.

Use of government buildings. We have searched for, but have not found, any statute governing the appropriate or prohibited uses of government buildings. Creating rules for the use of government buildings is up to the governmental authority that owns the building, subject to First Amendment considerations. State-owned buildings are under the authority of the Department of Administration. The rules promulgated by DOA do not address prohibited political activities in state buildings, although the rules do

restrict commercial activities and charitable solicitations. Adm 2.05, Wis Admin Code. Buildings owned by a local government unit would be under the authority of such local unit.

The issue of restricting public activities on public property is a complex issue that has been the subject of many court cases. Unlike the general rule that the owner of private property has the right and authority to control any expressive activity occurring on that property, a different rule has been recognized for publicly owned property. The United States Supreme Court has said that the permissibility of a restriction on speech on public property depends on the classification of the property in question. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differently depending on the character of the property at issue." *Perry Ed. Assn. v. Perry Local Educators Assn.* 460 U.S. 37, 45. The U.S. Supreme Court in *Perry*, recognized three types of publicly owned forums and articulated the standards for regulation in each forum:

1. At one end of the spectrum are streets and parks which have 'immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' . . . In places which by long tradition or government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. (at pp.45-46)
2. A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. (at pp.46-47).
3. Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. . . . In addition to time, place and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because the public officials oppose the speaker's view. (at pp.47-48)

Each governmental authority, and not the Board, is entrusted with making appropriate decisions, but the authority must be guided by these constitutional principles. With the caveat that a court, and not the Board, would be the arbiter of specific facts and circumstances, these principles suggest the following considerations:

- Government authorities may not unduly restrict building areas traditionally open to the public, such as the public areas in the State Capitol or entry ways to government buildings, without a compelling public interest..
- The government has broader authority to restrict entry to, and use of, private offices.

- The government has broader authority to restrict entry to, and use of, classrooms.
- Use restriction should not be content based – that is, it may not be based on the substance of the communication.

Ultimately, DOA, school districts, and local governments, must establish rules for its own buildings.

Validity of signatures on recall petitions. The sufficiency of a signature on a recall petition is governed by s.9.10 (2), stats. That statute does not invalidate a recall petition signature collected in violation of any time or place restrictions for public buildings or public employees imposed by statute or rule. A signature is invalid if it is not complete, s.9.20 (2)(e); the signer is not a qualified elector of the jurisdiction represented by the officer subject to recall, s.9.20 (2)(e); the signature is dated outside the circulation period, s.9.20 (2)(e); or the signature was obtained under false pretenses, s.9.20 (2)(e) and (2)(m).