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Louisville, Kentucky 40202

Re: Political activities of school employees

Dear Mr. Meade:

Although this letter is not a formal opinion of this office, we hope the views expressed will be of some assistance. You have requested that we reconsider OAG 92-145, which interpreted the impact on KRS 161.164 of *State Bd. of Elementary and Secondary Education v. Howard*, 834 S.W.2d 657 (1992). Specifically, you have questioned whether school employees' wearing badges or buttons endorsing school board candidates while on official duty constitutes a "service" to a candidate within the meaning of KRS 161.164(2).

The Supreme Court of Kentucky, in the *Howard* case, held invalid subsection (1) of KRS 161.164 as overbroad under the First Amendment, except insofar as it prohibits school employees from taking part in the management of a campaign. That subsection states: "No employee of the local school district shall take part in the management or activities of any political campaign for school board." Subsection (2), which was upheld in *Howard*, provides: "No candidate for school board shall solicit or accept any political assessment, subscription, contribution, or *service* of any employee of the school district." (Emphasis added.)

In OAG 92-145, this office was called upon to interpret the remaining limitations on the involvement of school employees in school board campaigns.

We defined "service" under KRS 161.164(2) as "work performed for another or a group; assistance given to someone; and goods or utilities that benefit the public." We noted that "[p]olitical service may often invoke First Amendment principles yet also be the type of political involvement in our school system that the General Assembly seeks to prohibit. Thus, the specific service must be analyzed and the First Amendment right to voice one's political opinion must be balanced against the state's interest in ridding our schools of undue political influence." For example, "the state's interest in neutral schools is outweighed by school district employees' constitutional right to personally express their preference of a candidate, to read campaign literature, *wear a campaign button,* or place a sign on their property." (Emphasis added.)

OAG 92-145 provides a list of "permitted conduct" and a list of "prohibited services" in an effort to "balance[ ] the rights of school district employees and school board candidates to be involved and state their opinions in the political process with the state's interest in political neutrality in the schools." The list of "permitted conduct," which sets out those activities protected by the First Amendment, includes "Badges, buttons, and bumper stickers. *School district employees may voluntarily wear school board campaign badges or buttons. However, no school board candidate badges or buttons may be worn by a school district employee while such employee is on official duty."* (Emphasis added.) No reference to the wearing of badges or buttons appears on our list of "prohibited services," which enumerates services a candidate may not solicit or accept from a school employee.

Your central criticism of this portion of OAG 92-145 is as follows: "Wearing a campaign button is recognized as a protected activity for employees. It cannot constitute a prohibited service to a candidate. Certainly, the wearing of a campaign button during duty hours does not so change the character of the activity as to render it a service. If it is not a service, it is not prohibited by the statute."

We agree that wearing a campaign button while on duty is not a prohibited "service" under KRS 161.164(2); however, it was not the intent of OAG 92-145 to categorize it as such. Rather, the list of "permitted conduct" was meant to delineate those political activities protected by the First Amendment, which do not include wearing campaign buttons while on official duty. The fact that

wearing campaign buttons is not a "prohibited service" does not automatically mean that wearing them while on duty is conduct protected by the First Amendment.

In OAG 12-013, we recently had occasion to examine a statute prohibiting certain political speech activities of city police and firefighters while on duty. We analyzed the constitutional aspects as follows:

> It is clear that units of local government have considerable leeway under the First Amendment to restrict the political speech activities of their employees in a content-neutral manner. *Cron v. Chandler*, 25 F.3d 1047 (unpublished disposition), 1994 WL 256704 (6th Cir. 1994). "Even when off duty and out of uniform, public employees may be restricted in their public political activity in the interests of an efficient government free from hints of corruption, influence, and connection." *Id.* at *4 (citing *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565-66 (1973)) (emphasis and internal quotation omitted); *see also Horstkoetter v. Dept. of Public Safety*, 159 F.3d 1265 (10th Cir. 1998) (policy prohibiting highway patrol troopers from displaying political yard signs was facially constitutional). But the authority to regulate employees' political activities is especially comprehensive in the workplace.
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> "The government 'may impose restraints on the *job-related* speech of public employees that would be plainly unconstitutional if applied to the public at large.'" *Breyley v. City of North Royalton, Ohio*, No. 1:04CV1956 (N.D. Ohio, September 14, 2005) (unpublished disposition), 2005 WL 2233231, *4 (emphasis added) (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995)). Thus, a county could rightfully prohibit its employees from placing "political insignia" on their private vehicles if parked on county property. *International Brotherhood of Electrical Workers, AFL-CIO, Local #1 v. St. Louis County*, 117 F.Supp.2d 922, 925 (E.D. Mo. 2000); *accord, Breyley, supra.*

Thus, we concluded that the statute limiting political speech activities to off-duty hours would not be unconstitutional under the *Howard* standard.

Based on the same analysis, we conclude that wearing campaign buttons while on official duty is within a public employer's constitutional authority to prohibit. We therefore take this opportunity to clarify the exception we made on the list of "permitted conduct" under the First Amendment in OAG 92-145. It was not our intention to state that this activity was prohibited by force of KRS 161.164(2); however, neither is it outside the purview of restriction by a public employer under the Constitution. As such, a school board may decide to allow or prohibit the wearing of campaign buttons by its employees while on official duty.

Accordingly, we decline to reconsider our opinion in OAG 92-145. If you have any questions, you may call this office at (502) 696-5622.

Yours very truly,

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