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RESTRICTIONS ON POLITICAL CAMPAIGNING

by PUBLIC EMPLOYEES, ORS 260.432

Issued By

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2004 Restrictions on Political Campaigning by Public Employees

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RESTRICTIONS ON POLITICAL CAMPAIGNING BY PUBLIC EMPLOYEES, ORS 260.432

(updated January 21, 2004)

INTRODUCTION:

The purpose of this document is to provide the reader with guidance on how the provisions of ORS 260.432 (1) and (2) apply to public employees, public employers and elected officials. The information should be viewed as a reference or starting point rather than a comprehensive list of all activities that could fall under these statutes. It is our intent to give the reader a framework upon which to base decisions regarding election-related activities. Further, we also extend the services of our office to provide prior review and advice to public agencies and individuals on allowable actions. *NOTE: Federal employees must also follow the requirements of the Federal Hatch Act - including persons principally employed by state or local executive agencies in connection with programs financed in whole or in part by federal loans or grants - check with your employer if you have questions on applicability. See page 20 of this memorandum for contact information on the Federal Hatch Act.*

ORS 260.432 STATUTORY PROVISIONS:

ORS 260.432(1) states that a person - including public employers and elected officials - may not require a public employee to promote or oppose any political committee or any initiative, referendum or recall petition, ballot measure or candidate.

ORS 260.432(2) states that public employees (including school administrators, city managers, police chiefs, etc.) may not be involved in promoting or opposing any political committee or any initiative, referendum or recall petition, measure or candidate "while on the job during working hours." *NOTE: This subsection does not apply to elected public officials but does apply to all other public employees including the staff of elected public officials. Public officials who are not elected- whether paid for their service or not - such as members of appointed boards and commissions, are considered to be "public employees" for purposes of this statute.*

ORS 260.432(3) states that each public employer must have posted - in all appropriate places where public employees work - a notice about the prohibitions of ORS 260.432. See page 19 of this memorandum for more information about this requirement.

Note: ORS 260.432 is in effect as follows: for initiative, referendum and recall petition efforts as soon as a prospective petition is filed with the appropriate elections filing officer; for a ballot measure referred to the ballot by a governing body (district, city, county, state) as soon as the measure is certified to the ballot; for candidate issues, as soon as the person becomes a candidate under the definition in ORS 260.005(1)(a); and for actions related to a political committee, whenever the political committee is active.

OVERVIEW OF RESTRICTIONS AND ALLOWABLE ACTIVITIES

The overriding principle is that public employees may not use their work time to support or oppose measures, candidates, or petitions. Oregon election law does not specify any amount of work time that may be used before a violation occurs. The fact that the work time used may have been minimal is not a mitigating circumstance.

Moreover, an elected official or any other employer of a public employee may not require or direct public employees to prepare or distribute such materials. A work assignment made by a supervisor to a subordinate public employee is a

command or requirement within the meaning of ORS 260.432(1).

In fact, elected officials or other employers of public employees should be aware that when they - in the role of a supervisor - request a public employee to perform any campaign activity (such as typing and mailing a campaign related document) that the request is considered to be an attempt to require the public employee to perform those tasks. The Elections Division has consistently found that in the work place, a superior's request to a subordinate is considered to be a command.

The following examples of restrictions and allowable activities are not all inclusive; however they do address a list of common concerns and issues.

EXAMPLES OF RESTRICTIONS ON PUBLIC EMPLOYEES

- ◆ Public employees **may not** be involved while on their work time in activities such as collection of funds, receipt and distribution of advocacy materials, or preparation of correspondence on behalf of political action committees or candidates.
- ◆ Public employees **may not** assist with candidate filing forms, voters' pamphlet filings, contribution and expenditure (C&E) report forms or related correspondence during their work time.
- ◆ Public employees' work time **may not** be used to produce or distribute political documents advocating a vote for or against a measure, or news releases or letters announcing the elected official's support or opposition to a political committee, measure, candidate, or petition.
- ◆ Public employees' work time **may not** be used to post website information, transmit emails or make a presentation that advocates a political position.
- ◆ A public employee **may not** be involved in producing or distributing a news release announcing a candidate's filing which includes reasons for support of the candidate, the candidate's goals if elected, or other supportive information.
- ◆ A public employee **may not** make outgoing calls to schedule or organize campaign events or other political activity on behalf of an elected official or political committee.
- ◆ A public employee **may not** grant unequal access to public facilities to candidates or political committees.
- ◆ A public employee **may not** draft, type, format, edit, sign or promote a governing body's resolution (vote) that advocates a political position. Additionally, they may not take other related actions. (See specific information on page 6).

EXAMPLES OF ALLOWABLE ACTIVITIES FOR PUBLIC EMPLOYEES

- ◆ Public employees **may** use personal time, lunch hours, breaks, days off - when the employee is considered to be off duty - for political activity, dependent on other employer lunch/break policies. However, any such activity must be of a voluntary nature on the part of the employee. In other words, employees who elect to use this time for political activity must not feel obligated or coerced to do so by co-workers or supervisors.
- ◆ Public employees **may** wear political buttons at any time subject to applicable employer policies. However, other activities such as displaying campaign signs or distributing campaign materials are not allowed during public employee work time.
- ◆ Public employees **may** participate in the planning stage of a governing body's proposed issue, before it is certified as a measure to the ballot, as this stage is not subject to ORS 260.432. Research, public meetings, surveys and other actions by a governing body to aid in the decision making process of whether to refer a measure to the ballot are not covered by the statute.

(Note: ORS 260.432 applies to an initiative, referendum or recall petition as soon as it is filed with the elections filing officer, even before it is approved for the gathering of signatures.)
- ◆ A public employee **may** use work time to perform their standard job duties, such as maintaining public records, opening mail and taking the minutes of a public meeting, including recording elected officials' discussion and reasoning for adopting a resolution or voting to support or oppose a measure (see page 6 for further discussion of such resolutions by a governing body).
- ◆ A public employee **may** perform the follow-up maintenance of public records and making copies available upon request from the public, in the same manner as staff would process any other similar citizen request.
- ◆ A public employee **may** participate in an elected official's campaign activity - on a voluntary

basis - during working hours using lunch hours or any leave time, but they should document the dates and times spent in a personal journal or log book. The employee must accurately record the use of the leave time on their payroll worksheets.

- ◆ A public employee **may**, as staff of an elected official, handle incoming calls about the official's availability for political events.
- ◆ A public employee (or other person) **may** impartially advise employees about possible effects of a ballot measure, but **may not** threaten them with financial loss to vote a particular way.
- ◆ A public employee **may** address election-related issues while on the job, in a factual and

impartial manner, if such activity is legitimately within scope of employee's normal duties.

- ◆ A public employee **may**, at any time, express personal political views. This statute is not intended to grant unconditional permission to "express personal political views" in any way at any time.

A public employer may establish policies restricting expression of personal political views by employees where such expression reasonably may be interpreted by others as officially endorsed by the public employer. Conversely, a public employer must be cautious to not infringe on the public employee's right to express personal political views.

SOME SPECIFIC SITUATIONS

1. Candidate Forums and Measure Debates held by Public Jurisdictions

It is not an election law violation for a government jurisdiction to sponsor a candidate forum if it is open to all candidates. All candidates filed for the same office must be invited to participate (the candidate forum is still acceptable even if a candidate chooses not to attend). There must not be any intent to promote or oppose specific political views, candidates or issues.

Similarly, a forum to allow political proponents and opponents to debate ballot measures may be held using public employee work time if equal access is granted. (May also want to see page 9 for a discussion of visits by candidates or candidate representatives.)

Under these circumstances, the public employee work time used in arranging such a forum would not be in violation of election law. The public employees may perform normal job duties in conjunction with the forum and may attend on work time as long as they do not take any actions while on the job to promote or oppose the candidate(s) or measure(s), beyond facilitating the event. Further, it is not a violation of election law for a candidate at such a forum to discuss issues that may be a part of their campaign.

It is helpful if the public jurisdiction has in place and follows a policy on these types of situations. Such a policy must be reasonable and impartial.

2. Distribution of Political Material within a Government Agency

We routinely discourage the distribution of campaign advocacy materials to public employees through a government mail or distribution system, regardless of the source of the materials. *(NOTE: Unions can distribute such materials to their members pursuant to their contract.)*

It is not a violation for a public employee, as part of their regular job duties, to process incoming mail that may include political material addressed to employees. However, it is a violation of election law for a public employee to distribute political advocacy materials to other employees or constituents (such as students) while on the job during working hours.

If a public agency is given any election-related material to distribute to employees or constituents by any outside entity, the agency must vigilantly screen the information prior to distribution to assure it is not political advocacy.

3. Governing Body Actions Before Issue Certified as Measure

ORS 260.432 does not apply to measures referred to the ballot by a governing body until the governing body has certified the proposed issue to the ballot as a measure. "Measure" is defined in ORS 260.005(12), as something that has been "*submitted to the people for their approval or rejection at an election.*" The actions taken by a governing body and its public employees in the planning stages of a proposed measure, before it is certified to the ballot, are not subject to ORS 260.432.

Research, public meetings, surveys and other actions by a governing body to aid in the decision making process of whether to put an issue on the ballot are not within the purview of the statute. Once the issue is certified to the ballot however, no public employee work time may be used to redistribute any material that advocates a political position on the measure.

For initiative, referendum or recall petitions, ORS 260.432 does apply during the signature gathering phase even before the proposed measure or recall is certified to the ballot. ORS 260.432 applies to these petition efforts as soon as the prospective petition is filed with the elections filing officer, even before it is approved for circulation of signatures. This is because any communications made by public employees at this time could also affect the petition circulation once it is approved.

While ORS 260.432 does not prohibit public employees from any discussion of the subject of an initiative or referendum petition or ballot measure, a distinction must be made between an act that supports or opposes a petition or measure and the performance of duties normally expected or required of a public employee as part of his or her job. For instance, a spokesperson for an agency, if interviewed by the news media as part of the employee's normal duties, may respond with factual information on possible effects of a petition or measure. In this case, the public employee must be cautious not to imply to listeners that the employee or public employer support or oppose the petition or measure.

Public agencies and employees may provide information on an issue that is also the subject of an election petition or measure as long as the information is factual, unbiased and appropriate to the conduct of the agency's usual business. The fact that information is an analysis of a petition or ballot measure is not, in and of itself, unlawful advocacy. However, any analysis must be fairly presented to include only factual information, not speculation. Further, the analysis cannot be one-sided, but must provide a balance of information.

Additionally, ORS 260.432 does not prohibit the expression of personal political views. However, such expression cannot be a part of an official public agency communication, done while the employee is on the job or in an official capacity. If the employee chooses to express personal political views, the employer needs to make it clear that he is not speaking on behalf of the public employer.

4. Information about Election Matters Provided by Public Employees

A public employee may provide only impartial, factual information related to an initiative, referendum or recall petition, measure or candidate as a part of the employee's job on work time. For detailed information on determining whether information is impartial, see pages 11-15 of this memorandum.

If any public employee makes public presentations or speeches regarding an initiative or referendum petition, or ballot measure while on the job during working hours ("official duty") they must make sure the speech is only factual and neutral in its presentation. The criteria for written material discussed later on pages 11-15 of this memorandum apply.

A public employer can tell employees about the possible effects of a measure, such as possible layoffs; but the public employer must not threaten employees with financial loss if they vote one way or another.

A public employee may address election-related issues while on the job, in a factual and unbiased manner, if such activity is legitimately within the scope of the employee's normal duties. Nevertheless, ORS 260.432 does limit governmental participation in election-related

speech, and the statutory prohibition overrides any general statutory authority to educate the public on specific issues – they may do so but it must be impartial.

For instance, the political process is a subject that might reasonably be discussed in a high school social studies class. In this context, the focus on a specific election for illustrative purposes is not inappropriate as long as the employee's presentation of the material does not support or oppose any political committee or any particular candidate, petition or ballot measure.

Instructional material must provide a balanced review of both sides of an issue.

However, a student's work may express political advocacy. If credit is offered to students who voluntarily participate in a political campaign (must be voluntary), this would not be in violation of election law unless students were instructed or urged by the public employee to support or oppose a political committee or specific candidate, petition or ballot measure.

5. Legal Challenges by Public Jurisdictions

In general, public employee's work involvement in legal court challenges such as challenging the underlying legality of placing a measure on the ballot are not in violation of ORS 260.432 - it is not the same as opposing the measure itself.

Examples of such legal challenges include whether an initiative petition meets constitutional requirements and whether a ballot title complies with statutory standards. However, this does not mean that this type of action would be viewed as an allowable use of public funds by the public jurisdiction, which is an issue not under the Secretary of State's authority.

6. Meetings and Presentations at which a Ballot Measure is Discussed

It is possible that a public employee may be present at a meeting (for candidate or measure forums see page 3), along with a mixture of people, some of whom are not public employees and so are not bound by the same rules as public employees. A question may occur when a public employee attends a meeting and discussions or presentations arise concerning campaigning for or against passage of a measure. A similar question is whether a public employee may participate as a

speaker in presentations to service organizations (such as the Rotary, Lions, Chamber of Commerce) if one of the other presenters (who is not a public employee) expresses political advocacy in their part of the presentation.

In the first instance, if discussions concerning campaigning for or against a measure (or petition, candidate etc.) are part of the pre-planned agenda, then the public employees should not participate in those activities, which could involve the need to leave the room. It is advisable that, if possible, an agenda be developed in which that part of the activities could be done at a separate time before or after public employees attend, to allow efficiency in use of work time. For more ad hoc discussions that may arise when a non-public employee decides to advocate for the measure, unless it becomes extensive, the public employee is not required to leave the room, but they should not join in those activities or discussions, other than to offer impartial information if needed.

Merely being in an audience when another person is campaigning for a measure is not in and of itself evidence that the public employee is promoting or opposing the measure. In any case, it is advisable that the facilitator make a statement at the beginning of the meeting that the public employees in attendance are only available to provide impartial, unbiased information.

This same advice extends to the question about public employees participating in presentations to Rotary, Lions, Chamber of Commerce and other service organizations if one of the other presenters, who is not a public employee, campaigns in their part of the presentation. For instance, if the public employee is to be a part of a panel of speakers, at the beginning of the presentation, the facilitator should announce that the public employee involved may not advocate on work time and is only there to provide impartial information.

A public employee presenting impartial information about a ballot measure on their work time or official capacity must follow similar standards for impartiality as outlined for written materials (see page 11 of this memo). Furthermore, if the employee is a salaried employee (management type position) rather than hourly, see additional cautions in this memo, page 7.

If the public employee is not attending on their work time or in their official capacity, they may

themselves announce that they are on their own time and so not be under the same restrictions. In this case, the employee must be able to document that they were not on the job should a complaint be filed against them alleging a possible election law violation.

Again, although the best way may be to have the public employee, if they are on work time, attend only for the information portion, it is not an election law violation should the employee sit at a speakers table with other participants and merely listen while another non-public employee speaker makes an advocacy presentation.

Complying with the restrictions of ORS 260.432 does require making judgment calls by public employees and there are sometimes no hard and fast rules regulating every circumstance. Public employees should exercise caution and pay careful attention to the guidelines discussed here.

7. Resolutions (Vote taken) by an Elected Governing Body, Advocating a Political Position

A public employee, in regards to an elected governing body's resolution that advocates a political position:

- **May not** draft, type, format or edit the resolution. (Edits to insert the appropriate jurisdiction's name and board member names are allowed.) Such a resolution should be drafted and prepared by a member of the elected board or someone who is not a public employee;
- **May not** prepare or recommend to the governing body which way to vote on such a resolution;
- **May not** sign such a resolution, unless the employee's signature is only ministerial and clearly included to attest that the board took the vote. Language labeling the signature as such must be included;
- **May not** use work time to prepare a news release or other announcement of the resolution;
- **May not** announce the governing body's position on such a vote to the media in an advocating manner (employee may respond to direct questions from media about the

resolution by impartially stating the board's vote); and

- **May not** include the position or vote on such a resolution in a jurisdiction's newsletter or other publication. In very limited circumstances, there may be an exception: if the jurisdiction has a history of listing all resolutions and action items at a board meeting in a regularly published format and the advocating resolution is listed in an impartial manner. In any case, it is not advisable to include any text from the resolution that advocates for or against a ballot measure.

Note: A board or commission consisting of appointed members are considered to be public employees for purposes of ORS 260.432. Therefore, they may not act in official capacity to pass a resolution advocating a political position.

A public employee, in regards to an elected governing body's resolution that advocates a political position:

- **May** use work time in an incidental way to record the vote if that is part of the employee's normal work duties. For example, a public employee may take the board's minutes and, in a clerical manner, incorporate amendments into a finalized version of a governing body's resolution on an issue;
- **May** prepare strictly neutral, factual information for a board to use in taking a position on a measure, such as financial impacts of a ballot measure;
- **May** be available at the board meeting to offer neutral information about a ballot measure to the board upon the board's request;
- **May** make copies of the proposed resolution and include the drafted resolution in the board packet to be distributed as usual before the board meeting;
- **May** prepare impartial information that indicates the impact that a ballot measure would have on the jurisdiction;
- **May**, following passage of a resolution, retype the resolution to conform to the jurisdiction's usual resolution format and place the resolution and related documents into the official public record of the meeting; and
- **May** fill public record requests as usual.

Activities, beyond these, related to the elected official's vote, or that are intended to help in implementing a campaign strategy in some way, are not allowed on the public employee's work time.

Elected officials may not request public employees to perform prohibited activities as outlined above. They may not compel public employee staff to become involved in a ballot measure campaign.

8. Salaried (Management) vs. Hourly Staff

Salaried employees' work time is not as easily measured as that of hourly workers. If the work performed falls generally within the job duties of the public employee, then it is assumed that the work is performed in an official capacity, regardless of the time of day or location. Salaried employees must be careful during all appearances both after normal work day hours as well as during working hours. They must not advocate on behalf of, or against a petition, measure or candidate if they are considered to be in their "official capacity."

For example, if the salaried employee applies for expense reimbursement for the function, it would indicate that they were "on duty." *NOTE: If complaints of this nature are received by the Elections Division, we will investigate whether or not the activity was undertaken in the employee's official capacity.*

Personal note-keeping by salaried employees is suggested. Recording when the employee is on or off duty can determine whether they are acting in their "official capacity." Also, during public appearances, the employee should specifically announce to the audience in what capacity they are speaking.

It is important to recognize that "regular workday" may not be definable for a position, or may not have a specific time period but is based on the activities and whether the person is acting, or appears to be acting, in an official capacity. The employee may need to define this with their employer. It would be up to the appointing authority or employer to determine what is considered the "regular workday" and what time would be considered his or her own time, when

the person would be able to support or oppose a candidate, measure or political party.

For instance, in the case of a school superintendent, at all school board meetings and school functions, he or she would be considered acting in official capacity based on their administrative and management position. Another instance where the public employee is considered "on the job during working hours" is when a salaried, executive or management level public employee (or other level) uses what they consider personal time and personal equipment to prepare an official public agency publication that is to be distributed using public agency resources. Since in this case the public employee is conducting official agency business, the publication must be impartial or a violation would occur.

9. Telephone Calls

The handling of incoming calls about the elected official's availability for political events is permitted because the elected official's scheduler must be aware of the elected official's schedule.

Elected official's staff should not make outgoing calls while on the job during working hours to solicit political scheduling opportunities for the elected official, organize campaign events, communicate on political matters with the press or constituents, or initiate any other political activity on behalf of the official.

Additionally, incoming calls about measures must be answered in a strictly factual manner.

10. Union Bulletin Boards

Public employee unions are allowed to have a designated bulletin board to post information regarding union business. The contents of those bulletin boards are regulated only by collective bargaining agreements.

11. Use of Public Buildings, Facilities and Property

ORS 260.432(2) prohibits only the use of a public employee's work time for campaign activities while on the public payroll, and does not regulate the use of public facilities or property for election purposes. If the governing body allows one political group to use public facilities, all groups should have the same opportunity. The same building policy should be used for everyone,

including charging the same fee or requiring the same permit. If unequal access is granted, a public employee who facilitates such services may have committed an election law violation. It is not an election law violation for a public facility to have policies exceeding the requirements of election law.

ORS 294.100 provides a limited remedy for complaints and concerns about possible inappropriate use of public resources, which may involve a civil suit by the District Attorney or taxpayer. ORS 294.100 is not under the Elections Division's jurisdiction.

Questions sometimes arise about **campaign signs**. Oregon election law does not address the size, location or timing of political campaign signs. Many local jurisdictions (cities and counties) have ordinances that address these issues. In addition, the Oregon Department of Transportation has policies regarding political signs on public highways (see contact information on page 20).

Although this office cannot generally offer advice as to the applicability of these provisions to particular locations, there is a concern that public employees enforce such regulations in an equitable manner so as not to indicate any support or opposition to political candidates or issues.

Campaign signs on or in public buildings or property may be against the public facilities building policy, which is not under this office's jurisdiction. To indicate an election law violation there would have to be evidence of public employee involvement while on the job during working hours in the placement of the sign, and/or allowing unequal access to the placement of such signs to all sides of an issue or to any candidate.

Most public jurisdictions wish to avoid the public perception of the jurisdiction's endorsement and so have a policy of not allowing campaign signs on or in the public building, property or on public equipment.

Similarly, placement of **campaign signs on public vehicles** is inadvisable, although again not necessarily an indication of election law violation. Campaign signs on private vehicles located at a public building are not within the purview of

election law. Public employees should take caution in this area - there may be circumstances in which an election law violation occurs.

Another related question is about the **use of public vehicles** during campaign activities. An elected official is not in violation of election law to use a public vehicle for campaign purposes - but may be subject to the jurisdiction's policies and may violate Government Standards and Practices laws. Similar to the above advice, it is not an election law violation for public employees on off-duty time to use a public vehicle for campaign activities - but again, they would be subject to the jurisdiction's policies and these activities may also violate Oregon Government Standards and Practices laws in ORS Chapter 244 (OGSPC contact information on page 20).

Another issue that arises about public property is the use of **official government letterhead** for political purposes. For the reasons explained above about the limits of ORS 260.432, such usage is not in and of itself a violation of election law. In order for a violation of ORS 260.432 to be found with regard to a campaign publication on official government letterhead, public employee work time would have to have been used in its production and/or distribution.

Connected to this issue is use of the **Oregon State Seal**. ORS 186.023 governs the use of the Oregon State Seal. Elected officials are entitled to use the state seal in their official capacity, but not in their capacity as candidates for public office. The state seal may not be used in connection with an individual or organization if its use implies endorsement or sponsorship of the State of Oregon.

12. Use of Title of Public Employee

It is not an election law violation in and of itself for a public employee's working title to be included in a campaign publication or in an editorial letter if either was written or produced on the employee's personal time (with no on-the-job assistance of other public employees).

If someone else (such as the media) refers to a public employee by the employee's title on the person's own initiative and without consulting the public employee, that in itself would not suggest a violation of election law by the public employee.

13. Visits by Candidate or Candidate Representative

A political candidate, or candidate representative, may request a visit to a government agency work site (often times a school). (Note: This discussion is not about an elected official's official visits to their jurisdiction's public agency worksites, which in general are not be prohibited by ORS 260.432.) On page 3 of this memo, we have discussed candidate forums and measure debates and advised that these are allowable for a government jurisdiction to sponsor if they are open to all candidates for the same office or all political proponents and opponents of a measure are allowed to debate. Along these same lines, if a candidate is allowed to visit the government agency work site, then all candidates for the same office must also be allowed similar access, if requested.

For example, a school district may allow candidate visits (most often of a nationally or state recognized political figure) as an educational experience for its students, as long as candidates for the same office could request equal time. Further, it is not a violation of election law for a candidate at such an appearance to discuss issues that may be a part of their campaign. When a nationally or state recognized political figure, such as a presidential candidate, arranges a visit to a government agency site, such as a school, special arrangements may be required for security purposes. Public employees involved with the arrangements are not considered promoting or opposing the candidate when performing normal job duties.

It is advisable for a government agency such as a school district to have a policy in place for handling such candidate visits. To avoid even the appearance of prohibited political advocacy by public employees at a government agency, the policy about candidate visits should include:

- In most cases, the government agency should not initiate the visit (normally these visits are requested by the candidate), unless it is to be a candidate forum as discussed on page 3;
- Any other candidate for the same office shall be allowed similar access if they request it (if the visit occurs as the result of one candidate's request for the visit and it involves more than just a tour of facilities, such as a speech to a student body, the agency is not required to proactively invite all other candidates, although

some type of notification to the other candidates would be appropriate);

- The government agency's purpose for allowing the candidate visit is not to advocate a political position to constituents, but rather to, for example, provide an educational experience, discuss policy, etc.;
- Public employees may perform normal job duties to assist in any special arrangements needed for security or other purposes;
- No public employee may take any actions to proactively promote or oppose the candidate before or during the visit, such as taking a political position when announcing the event, holding a campaign sign during the event, or assisting the candidate in distributing campaign advocacy materials; and
- Overall, great caution should be taken by all public employees involved in such a candidate visit to ensure their activities in regard to the visit, while on work time or in official capacity, do not in some way promote or oppose the candidate. All involved public employees should be reminded of the election law ORS 260.432 and its restrictions on political campaigning by public employees prior to such a visit and the notice required by ORS 260.432 (3) must continue to be posted in conspicuous places in the work site.

14. Wearing of Uniform by Public Employee

A question often arises as to whether it is an election law violation for a public employee to wear an official uniform (such as that of a law enforcement officer) outside of the employee's work hours and not at work - in the context of political activity of some kind. Obviously, the public would identify the uniform with the position.

ORS 260.432 does not address the use of public funds or facilities and so it would not be a violation of ORS 260.432 for a public employee to wear their uniform on personal time during political activities. However, it would likely be against the employer's policies and in many cases inadvisable. Our office does not arbitrate disputes between such policy and procedures and employees over matters not related to state election law.

As stated in this memorandum, if the employee is salaried, they must be careful not to advocate if they are considered in their "official capacity" and

must be able to provide such documentation if a complaint were filed.

Notwithstanding this advice, it is important to understand why the public may perceive that an election law violation has occurred in such a situation. The public perception that an employee is on duty because they are in uniform is understandable. When a member of the public views a public employee participating in an otherwise prohibited activity while they appear to be in their official capacity, it raises questions.

Contributing factors to this perception, even though not in themselves a violation of election law, may include:

- The public employee is photographed in a work setting;
- Whether the public employee is wearing a uniform;
- The literature identifies the public employee by their work title; and
- The content of the literature in which a photo of the public employee appears may imply a personalization or support of the candidate by the employee or employer, which could contribute to the public perception of a possible violation.

ELECTED OFFICIALS

An elected official may personally advocate for or against candidates or measures on the official's work time. They are not considered a "public employee" for purposes of ORS 260.432. *NOTE: A person appointed to fill a vacancy in an elective public office is considered an elected official for purposes of this statute.*

Oregon election law does not prohibit elected officials from communicating with their constituents about election issues. However, caution must be taken by elected officials to not involve public employee's work time in any activities that could be construed to be supporting or aiding an advocacy campaign effort, such as preparing advocacy material on behalf of an elected official (i.e. speeches, letters, advertising pieces).

An elected official's opinion piece or letter advocating a political position may not be published in a jurisdiction's newsletter or other publication produced or distributed by public employees.

For instance, public employee support staff may not prepare press releases or constituent mail that advocates a vote, candidate filing forms, voters' pamphlet filing forms, contribution and expenditure (C&E) report forms or related correspondence during their work time.

Elected officials, as part of a governing body, may vote with other elected officials (such as a school board, city council or county commission) to support or oppose a measure, and publicly discuss such a vote - but must not use the public employee staff time to assist in this, except for ministerial functions. Furthermore, care must also be taken in soliciting "volunteer help" during employee breaks, or other personal time, as the employee may feel required to participate. A request made by a person in a position of supervisor or superior is viewed as a command for purposes of this election law.

Oregon election law does not require an elected official, during the time when the official runs for re-election or for another public office, to discontinue activities that are a regular part of the elected official's duties - such as updates on official business. This office does not find that all communication from an elected official, based only on the timing of the communication in relation to an election, necessarily means that the communication is campaign advocacy for their candidacy. In such cases, the public employees participating in the publication would not be in violation of ORS 260.432.

WRITTEN MATERIAL RELATING TO MEASURES

THE ROLE OF THE ELECTIONS DIVISION IN REVIEWING DOCUMENTS

This office may need to review individual documents to determine if they must be considered advocacy material. In our review of such materials, we do not know whether all of the information presented in such a publication is accurate. but it is presumed accurate for purposes of the review. However, there would be a possible violation of ORS 260.432, if an elector filed a complaint with us that a public body presented inaccurate information that caused material to be considered advocacy.

This office offers to review draft documents prior to publication and issue an advisory letter with suggested changes with the goal of assuring the publication is impartial. However, we must offer a general caution that if a written complaint is filed with this office alleging violations of election law about a publication by a governing body, we will take all factors into consideration when examining the publication and surrounding circumstances. The complaint may bring forth surrounding facts, circumstances and information that are not within the purview of this office to know prior to a complaint.

For instance, we cannot advise an agency on whether any critical piece of information is missing in the drafted information about the measure that a reader may perceive as affecting their position on the measures, and thus could be deemed to reflect on the information's neutrality.

Therefore, we must caution that compliance with the suggestions does not preclude further review of the publication by this office in the event such a complaint is filed.

Once this office has reviewed a draft publication and all suggested changes have been made, the public agency may want to include a disclaimer on the document about that review. However, because as discussed above such reviews are issued with the understanding that this office does not know whether the information presented about a measure is accurate or sufficiently comprehensive or whether there are other unknown circumstances, it is not

appropriate to imply the information is "approved by the Secretary of State." Rather, an acceptable disclaimer that may be used (only if all changes were made as suggested) is, "This information was reviewed by the Oregon Secretary of State's Office."

FACTUAL VERSUS PROMOTIONAL MATERIAL PREPARED BY PUBLIC EMPLOYEES

Written material prepared or distributed by public employees must be impartial. "**Impartial**" means equitable, fair, unbiased and dispassionate. The material needs to contain a balance of factual information. This means that the material may not lead the voters to support or oppose the measure by selective use of factual material, even if the material does not expressly urge a yes or no vote.

The material may be determined to be advocacy if, when read in its entirety, it appears to be intended to generate votes for or against the measure. A reader should finish reading the information and think, "I have learned something about the measure," not, "Now I know why I should support (or oppose) the measure."

The distinction between strictly factual information about ballot measures and material that is considered to be promoting or opposing a measure must be made by reviewing the entire material, in the context of the presentation. We note that a publication that purports to contain only factual information may not necessarily be impartial, if the "facts" are presented in a persuasive manner.

According to the Attorney General in a letter dated October 5, 1993, "public bodies may use public funds to inform voters of facts pertinent to a measure, if the information is not used to lead voters to support or oppose a particular position in the election." It goes on to state, "However, we also have pointed out that 'informational' material may be found to 'promote or oppose' a measure even if it does not do so in so many words if the information presented to the public clearly favors or opposes the measure and, taken

as a whole, clearly is intended to generate votes for or against a measure."

DETERMINING WHETHER MATERIAL IS CAMPAIGN ADVOCACY:

Some factors that will be considered in making the determination of whether the material is advocacy include, but are not limited to, the following: *NOTE: Any of the factors listed below, viewed in isolation, may not be sufficient to reach this conclusion. However, taken as a whole, the combination of factors may indicate that the material is campaign advocacy.*

a) The **timing of the publication** relative to the election may, in some situations, be a factor if material is not typically published except at the time of an election and the information can be construed as advocacy.

Example: A special district produces a newsletter published shortly before a March election at which incumbent board members are candidates and the newsletter prominently features photographs of all of the current board members. Whether or not this newsletter is considered advocacy for the candidates must be made based on a review of the entire newsletter. At a minimum, the newsletter should not address the fact that some of these board members are also candidates at an election and should not include any information that could be perceived as advocacy for a candidate.

b) **The contents of the document must not explicitly urge a yes or no vote for the measure.** There should be no "vote yes" or "vote no" type language. For example, the document should not include phrases such as:

- "Vote Yes on Measure 99,"
- "Support for Measure 99 is encouraged,"
- "Measure 99 asks ABC County voters to authorize a temporary fee increase,"
- "The County is asking voters to approve funding that will maintain,"
- "Why Should I Vote for Measure 99?"
- "The District seeks funds to improve equipment and buildings,"
- "Voters are asked to consider support for Measure 99,"

- "At election time, please support the Home Rule Charter," and
- "On May 18, 2004, Anytown voters are being asked to continue their support of the community youth by renewing the Youth Action Levy, Measure 57."

The remaining text of the publication does not cancel out such a statement. That is, a document that is otherwise totally factual, balanced and neutral, yet includes a sentence such as the ones above, would most likely result in our determination of a violation of state law.

Another caution is to not include wording such as, "a Yes vote means..." unless "a No vote means..." is also included and both are balanced and impartial.

c) **The balance of factual information** and whether any negative (or positive) facts are mentioned at all. This does not necessarily mean an equal number of facts on either "side" must be mentioned. Documents about ballot measures published by public governing bodies should not be one-sided, but should fairly and impartially set out known advantages and disadvantages of a proposal.

When the information is specific as to what the funds would be used for, it is then appropriate to leave it up to the voters to decide if they want to obtain the benefits by authorizing the additional tax increases to pay for them. This type of explanation of costs involved and how funds would be used is considered factual information and adds a balance to the information.

Impartial ballot measure information should be a comprehensive description of what the measure would do, and not only select some aspects that may be viewed as more advantageous to discuss.

If a measure proposes to affect taxes or fees the following types of information should be included:

- The specific cost of the measure to an individual taxpayer or consumer;
- If appropriate, the amount of yearly taxes based on the average price of a home in

that community. (The "average price" should be a realistic figure for that community - too low a figure could result in a misleading estimate biased in favor of the measure.);

- Clarification on whether it is an increase in current taxes;
- Clarification on whether the amount is an estimate; and
- In cases where there is an overall cost, the total amount should be included (for instance the total amount of a bond). Ideally, this should include principal and interest for the total cost.

Additionally, the cost should not be worded in a way to minimize it (such as "less than or only \$5.00 per month" or "It's merely the cost of a paperback a month").

An example of advisable language explaining a measure's effect on taxes is, "*Measure 37-88 proposes a 3.5 million dollar twenty year bond, passage of this measure would result in an increase in property taxes of \$1.25 per year per \$1,000 of assessed value. For the average homeowner in Everyday City with a home assessed at \$150,000, the annual property tax increase would be \$200.*"

Another way to achieve balance in impartial measure information is to include any other known, feasible options, even those that may be considered unfavorable to the public agency. However, these options must be impartially presented and not described in a way to imply they are totally unacceptable. These options should not be presented solely in order to be criticized. Source information should be included for the reader to verify the information and to learn more if desired.

Another method sometimes used to present various sides of an issue is a side-by-side comparison. In this case, the reader must not be led to feel they have been persuaded that one way is the right way to go and the "other side" is not acceptable. There is a potential problem in lining up two plans and comparing them when one is already adopted and is better understood. The level of detail for the unimplemented plan would then be less and could look less considered.

- d) **The overall impression** a reader gets after reading the material should be an impression that neutral facts have been presented. The impression should be that the material is being presented to inform the voter rather than persuade them.

Information that is only **speculative** should not be included, as it tends to be persuasive. We advise steering away from theoretical, subjective and opinionated content. Rather, the material should be specific, descriptive and objective.

For example, the following speculative statements are inadvisable, "*Having modern computer software available will result in greatly enhanced test scores, improved attendance, faster learning of new skills, a lower drop-out rate, and an increase in college and training school attendance.*" Unless the document provides some sources and substantiation for these speculative statements, we advise they lend too much enthusiasm and persuasiveness to the information.

Whenever appropriate, we advise the **inclusion of citations to source information**, such as specific case studies. Statements such as "*District Schools are overcrowded,*" need a basis either included or referred to. Do not include such sweeping statements such as, "*Many cities drink from rivers that are in much worse shape than the Crystal River, using treatment technology far less comprehensive and modern than what is proposed for Everyday City by Measure 29,*" without providing some substantiating information or citation to authority to which a voter might refer to confirm the statements.

Additionally, we advise caution when including **comparisons** (listing pro and cons for a measure) and purporting to speak on both support and opposition sides. Any such formatted information should be impartial and as inclusive as possible.

- e) **The tone of the publication** should be dispassionate rather than enthusiastic for one side of the measure. The material should not include only statements regarding the possible favorable (or unfavorable) effects that passage of the measure would have. The

public may perceive information as persuasive or threatening if it presents dire consequences that are bound to elicit strong public response. For example, information that a *“levy would allow a program to continue”* is a more neutral statement than saying *“failure of the measure will destroy the program.”*

The information should be a description of what the measure does, an unbiased statement of objective fact, not a justification of why the measure is needed. Additionally, we advise avoiding glowing commentary on the jurisdiction that would benefit from a measure's passage, as this lends a tone of "We are great so you should support this measure..." to the information.

- f) **Documents should not be personalized or use personalizing pronouns.** We advise against providing information about a measure in a personalized format, such as a letter format addressed to "Dear Parents," customized for each area, and then signed by a public official. Rather, to ensure the neutrality of information about a ballot measure offered by a governing body, the information should be generic. A signed letter from a public official, who may be personally known by most constituents receiving the information, may evoke more empathy, enthusiasm and emotion than a generic fact sheet on a ballot measure. Additionally, such information should be made available to all voters in the jurisdiction, not just to certain constituents.

Along these lines, we advise that the use of personal pronouns, such as "our," "we," "I," "us," etc., lend a tone of "we are in this together" to a document and personalizes it, rather than the neutrality needed in an impartial informational document about a ballot measure. Therefore, we suggest that such words be changed to less personal words, such as "the," "it," "the district," "the board," "voters," "taxpayers," or "constituents."

Finally, rather than terms such as "neighbors," "friends," or "patrons," we advise more using neutral terms such as "voters," "taxpayers" or "constituents."

- g) **Documents should not, in most contexts, use the word “will”** in describing the results of passage of the measure. The word “would” is a better alternative, as it suggests that voters have a choice and the issue is not yet decided. The use of the word “will” suggests a desired outcome of passage of the measure and that it is set to happen. There may be other wording that should be changed for the same reason, such as “The measure provides a new source of income.” In this case, a suggested alternative is, “The measure would provide a new source of income.”

We note that in some cases, the use of the word "will" is appropriate based on the context - if it is not dependent on the measure's passage (such as *"The election will be held on May 18, 2004."*)

- h) **Documents should not, in most contexts, use the word “need”** in describing the purpose of the measure. Often times the word “need(s)” is more emotionally charged and can be interpreted to be a favorable statement about the measure. It has an element of urgency that is not appropriate in a factual, neutral piece. Basic facts about a measure should be offered, so that the voters may make their own assessment of what is "needed."
- i) **Headings, lead lines and other words or phrases should not lend a positive (or negative) tone** to the material, in favor or opposition to the ballot measure. This also applies to the usage of positive or negative connotations given by words or phrases. An informational publication should not be emotional, enthusiastic or persuasive. Adjectives should not be value laden or add a persuasive tone, such as “urgent, critical, important, dire,” Another inadvisable word is “cut(s). This word has a more raw and emotional tone to it and should be replaced by a more neutral word such as “reduction, eliminate, etc.), and....

NOTE: Some other examples of inappropriate words and phrases in publications about ballot measures produced by governing bodies and the reasons they are inappropriate are listed in an attachment to this memorandum.

j) **Quotes about the measure should not be included.** Likewise, lists of members of a political committee or others supporting or opposing the measure should not be included. This holds true even if a quote is from a government body's elected official. The use of such quotes and lists indicate an endorsement similar to campaign advocacy material and is, therefore, inappropriate.

Additionally, it is not allowable for a public agency to incorporate political advocacy material just because it has been previously published by a private entity, such as a newspaper. Again, it is imperative that publications produced and distributed by public employees be impartial, informational documents, regardless of who prepared the material.

k) **The use of graphics, checkmarks, formatting and photographs.** Checkmarks are often used as an indicator of what someone should do, and have a very positive implication. Checkmarks are also used in informal ballots and surveys that people complete by checking to indicate their choices. Therefore, we advise against the use of checkmarks in material about ballot measures produced by a government entity because the use of checkmarks significantly contributes to an effect of advocacy. For the same reasons, we advise against the use of positive graphics (such as a hand placing a ballot in a ballot box or a pencil marking an X in a box) in material about ballot measures produced by a government entity.

Additionally, caution should be used in formatting. Extensive formatting methods that serve to emphasize or de-emphasize certain information may result in a persuasive tone (such as the use of all caps, underlining, bolding, making some information (such as cost) in much smaller print, stars around wording, etc.)

Along the same lines, photographs used in a document should not be overly emotional. In an informational document it is important that photographs do not add to a tone of advocacy. Plain text without pictures lessens the likelihood that readers feel they are being

persuaded to empathize with the depicted situation and thus to support or oppose the measure.

l) **The use of phrases similar to campaign slogans.** Informational documents should not contain phrases that do not serve to present any factual information, but rather are a sort of motto, logo or catch phrase; in a way a "rallying cry." Some examples might be, "Help plan for the future," "Preserve Our Heritage, Guide Our Future," "Planning for our Future, Improving the Community," or "Our schools are an intelligent investment." These phrases are not impartial and informational, but are advocacy.

The use of such a motto or logo outside the context of an election would not result in an election law violation. However, used in the context of an election, they are, in effect, a campaign slogan promoting passage of the measure. Such "campaign slogans" are appropriately used by private political committees, but not by government agencies in publications about ballot measures.

m) **Information about how to contact the supporting or opposing political committee (PAC),** such as listing the PAC's phone number, may imply a connection between the governing body and the petitioners or supporters of the measure. However, if all PAC's are listed, both supporting and opposing, it may lend to the balance of the document.

n) **Reporting of an elected official's position on a ballot measure or an elected official's article advocating a position on a measure** should not be included in a publication using public employee work time. A publication produced using public employee time may only include facts about a ballot measure, not who supports or opposes the measure. Such inclusion would lend an implication of "I/we support/oppose this measure and so should you..."

For example, do not include, "*The Anywhere School Board position on Measure 789: Oppose*" or the text from the resolution that advocates for or against a measure." In very limited circumstances, there may be an exception: if

the jurisdiction has a history of listing all resolutions and action items at a board meeting in a regularly published format and the advocating resolution is listed in an impartial manner. In any case, it is not advisable to include any text from the resolution that advocates for or against a ballot measure.

Even in this case, the reporting must be done in a neutral manner. This also pertains to articles by elected officials advocating a political position. Even though an elected official may use their own work time to advocate a political position, such an article may not be included in a document produced and/or distributed by public employees on their work time.

- o) **Information about the "50% voter turnout requirement."** In 1997, Ballot Measure 50 was passed, amending the state constitution. The Constitution now requires that the passage of a measure to approve new or additional ad valorem property tax levies be obtained at an election where the number of electors casting a ballot is not less than 50% "of the registered voters eligible to vote on the question." This is the case for every election except for the general election during an even numbered year.

It has become common for governing bodies to include some information about this requirement in their publications about ballot measures. It is not considered advocacy to include strictly neutral, factual information about this requirement. Encouraging people to vote is an accepted practice of election officials and other public officials; however, that is different than encouraging passage of a measure.

The concern here is that this information should not be worded in such a way that it persuades voters that they must vote for the measure "now."

For example, we suggest that publications not include the phrases "double majority" or "super majority." These phrases have strong political connotations, so may lend themselves to the implication that the district is

suggesting that a voter must pass the measure now.

Merely stating, "*If fewer than 50% vote, this election will not count,*" misleads the reader and implies people must vote. If the measure does not pass, the turnout requirement does not apply and the election still "counts." Only passage of the measure would not be in effect if the turnout is less than 50% of eligible voters, even if a majority of affirmative votes for the measure. Either way, the elections results would still be "valid." Language characterizing the turnout requirement as necessary to make the election "valid," is inappropriate, because it implies that passage of the measure is the only "valid" result.

Some suggested, acceptable language for this requirement is:

- "For this local option tax levy measure to be enacted, it must receive a majority of the votes cast and voter turnout must exceed 50% of the registered voters in the district (*or county, city...*) (or 50% of the eligible voters.)"
- "Passage of the local option tax levy measure requires that it receive a majority approval of those voting on the issue. In addition, voter turnout at the election must exceed at least 50% of eligible electors."

GOVERNING BODY BALLOT TITLES AND EXPLANATORY STATEMENTS

Ballot titles:

This office has been requested in some instances to review **ballot titles** pertaining to local governing body measures. For state and local measures, ORS 250.035 (1) (c) states that the ballot title summary must be, "A concise and impartial statement of not more than 175 words summarizing the measure and its major effect." (Emphasis added.)

This offices' review of a governing body's ballot title for a measure (caption, question and summary) is limited to whether the content is sufficiently impartial in accordance with the standards used in reviewing for possible violations of the election law ORS 260.432. The other standards a ballot statement must meet as

stated in ORS 250.035 (which are that the statement must be concise, not more than 175 words and summarize the measure and its major effects) are not within the purview of this office. The governing body's legal counsel is responsible for such advice.

Explanatory statements:

ORS 251.345 states that the governing body for any electoral district that has referred a measure to the voters shall submit "an impartial, simple and understandable statement explaining the measure and its effect." (Emphasis added.)

It is noted that the Secretary of State's review of any draft explanatory statement intended for a voters' pamphlet is limited to whether the contents are sufficiently impartial in accordance with the standards used in reviewing for possible violations of the election law ORS 260.432. The Secretary of State does not provide a service of reviewing local governing body's draft explanatory statements for the other standards they must meet as stated in ORS 251.345 - that the statement must be simple and understandable and explain the measure's effect. The local governing body and its legal counsel are responsible for meeting these standards, because they require a comprehensive knowledge of the measure and its surrounding facts and circumstances not available to this office.

POSTCARDS AND SEPARATE INFORMATION PIECES

Another method government agencies may use to provide election information is the use of postcards. Postcards usually allow for fewer words to be included, and often include graphics, so there is a need for discretion.

A concern that may arise is when a series of postcards are distributed for this purpose. There are general concerns about an information effort done in separate pieces, because whenever such information is separated, there is always the chance that a reader may miss part of the information in the midst of the amount of mail they may receive. Therefore, the optimum advice is that any ballot measure information document that is published (for a measure imposing taxes or fees) and that includes any discussion of what the measure would do, needs to be balanced with the amount of the tax or fees.

If the postcard is only a "don't forget to vote," type of notice, then detailed measure information including the cost is not required. Overall, while postcards may not be the best method for presenting important information about a ballot measure, they are appropriate for a "don't forget to vote" type of notice, as that does not need to contain much information.

PREVIOUSLY PUBLISHED MATERIALS

If material (whether complete articles or excerpts) has been previously published (such as in a private newspaper, for legislative analysis or other legislative purposes, a survey before an issue is referred by a governing body, etc.) it may not be included in a government agency publication about a petition or ballot measure or re-distributed by a government agency unless it is impartial on election matters. The public employee work time spent distributing any previously published documents that are not impartial at the time when ORS 260.432 is in effect would still be in violation of ORS 260.432.

Note: ORS 260.432 is in effect whenever the actions taken by a public employee apply to any of the following: for initiative, referendum and recall petition efforts as soon as a prospective petition is filed with the appropriate elections filing officer; for a ballot measure referred to the ballot by a governing body (district, city, county, state) as soon as the measure is certified to the ballot; for candidate issues, as soon as the person becomes a candidate under the definition in ORS 260.005(1)(a); and for actions related to a political committee, whenever the political committee is active.

It is recognized that such documents are historical documents and can be retained in government agency files. However, the fact that these earlier documents that are not neutral are "part of the public record," does not mean that the government agency may use current public employee work time to affirmatively distribute them for a different purpose. If someone asks for a copy of the record from public record files, the public employee may provide it under the same procedures as any other public record. Caution must also be exercised in excerpting any portions of such a document to include in any material distributed – to ensure any such excerpts are worded and used in a neutral manner.

SIGNS OR BANNERS

Signs and banners allow for only a few words to be read quickly at a distance, and often include graphics, so there is a need for discretion. There is not much opportunity to balance the document because of the few words used, and the few words have a lot of impact and focus. For signs and banners, we advise special caution about using checkmarks or graphics, or “campaign slogans” as discussed above.

VIDEO AND AUDIO PRODUCTIONS

This office offers to review draft video and audio productions produced by a government agency about a ballot measure, which must maintain the same standards of impartiality as discussed in this memorandum. A written transcript needs to be provided, as well as the actual draft video or audiotape. If a video or audiotape is not available at the time the review request is made, then a detailed description of the planned broadcast would need to be provided. In any case, if the actual visual or audio part is not pre-reviewed, this office can only offer suggestions on the written words. This is because the presentation of the text in video or audio may include other factors, such as tone and pictures, which may make a difference in the overall message. The same standards of being informational and neutral must be maintained in all aspects of the final publication.

WEBSITES AND E-MAIL

Website and e-mail communication are becoming another common method for governing bodies. Therefore, a public agency must have proper safeguards and oversight necessary to maintain the integrity of an official website to assure the contents do not reflect political advocacy. Each agency must make it a priority to insure that all personnel are apprised of the restrictions on political campaigning by public employees.

Public agencies should advise their employees of the proper and improper use of websites and e-mail in regards to political activity.

An e-mail that is supporting or opposing a petition, candidate or measure that is sent on a public employees' work time to a group of other employees of an agency or others would be a violation of election law by the public employee who wrote and sent it. Any public employee who

uses work time to produce a website that is political advocacy would be in violation of election law. Whoever is ultimately responsible for the website would also be responsible for its content.

The agency must also be cautious about the links that are included in the website. On page 9 it is noted that if a public agency allows one political group to use public facilities, all groups should have the same opportunity. Along the same lines, if a link is provided to any political group on one side of the issue, links should also be provided to any other known political group of the opposite view.

PUBLIC NOTICE REQUIRED BY ORS 260.432(3)

Each public employer must have posted - in all appropriate places where public employees work - a notice about the prohibitions of ORS 260.432. A copy of this notice is enclosed. You may make copies of this notice to distribute and post if you have not already done so. It is the same language as the notice distributed in 2002. ORS 260.432(3) states, *“Each public employer shall have posted in a conspicuous place likely to be seen by its employees the following notice in printed or typewritten form:*

ATTENTION ALL PUBLIC EMPLOYEES:

The restrictions imposed by the law of the State of Oregon on your political activities are that “No public employee shall solicit any money, influence, service or other thing of value or otherwise promote or oppose any political committee or promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views.”

It is therefore the policy of the state and of your public employer that you may engage in political activity except to the extent prohibited by state law when on the job during working hours.”

CONCLUSIONS

We caution all government entities, elected officials and public employers to be vigilant in ensuring that no public employee work time is used in any activity that could be construed as support of or opposition to a candidate, initiative, referendum or recall petition, or ballot measure, apart from the expression of personal political views. While it is understood that a government entity may have much at stake in matters relating to an election, it has a responsibility to ensure that its activities and those of its employees comply with election laws.

One additional statute, that all public bodies should be aware of, is ORS 294.100. It is “unlawful for any public official to expend any moneys in excess of the amounts provided by law, or for any other or different purpose than provided by law.” However, since this is not an election law, these complaints are to be filed with/by the District Attorney or by taxpayer suit. The suit would have to prove the

expenditure constitutes malfeasance in office or willful or wanton neglect of duty.

Lastly, we want to extend an offer to governing bodies to review any draft material about ballot measures prior to its publication. We hope the advice we offer will be helpful and prevent concerns or complaints by the public. If you have any questions, please contact this office.

If you have questions about these or other election laws, please contact the Secretary of State, Elections Division or your local elections office. Election officials are dedicated to helping citizens, public officials, candidates and political committees comply with Oregon law. Contact these offices to assist you with any questions.

Secretary of State/Elections Division
141 State Capitol, Salem, OR 97310-0722
tel: 503-986-1518, fax: 503-373-7414
web: www.sos.state.or.us

OTHER INFORMATION SOURCES

For questions regarding federal candidates or federal election regulations, contact:

Federal Elections Commission
999 E. Street NW
Washington DC 20463
Phone: 1-800-424-9530, Fax: (202) 219-8500
Website: www.fcc.gov

For questions regarding enforcement of Oregon's government ethics and lobbyist registration laws contact:

Oregon Government Standards and Practices Commission
100 High Street SE, Suite 220
Salem, OR 97310
Phone: (503) 378-5105
Website: www.gspc.state.or.us

For questions regarding political signs that are visible from state highways contact:

Oregon Department of Transportation
135 Transportation Building
Salem, OR 97310
Phone: (503) 986-3656

For questions regarding the Federal Hatch Act, applicable to federal employees, (including persons principally employed by state or local executive agencies in connection with programs financed in whole or in part by federal loans or grants - check with your employer if questions on applicability).

U.S. Office of Special Counsel
1730 M St. NW, Suite 201
Washington, D.C. 20036-4505
Phone: 1-(800) 854-2824
Website: www.osc.gov

For questions about county elections, contact information is available at:

Go to Website: www.sos.state.or.us - select link to "Elections," then select link to "Federal, State & County Officials."

ATTACHMENTS

Overview of changes from 2002 memorandum to this 2004 memorandum

Examples of Inadvisable Language

Statutes

Checklist For Reviewing Draft Documents About Ballot Measures

**Attorney General Letter (10/5/93):
Statutory Restrictions**

Public Employer Notice Form

OVERVIEW OF ADDITIONS FROM 2002 VERSION TO 2004 VERSION

There have been no statutory changes to ORS 260.432 since the 2002 edition of this memorandum. However, some advice requests and complaint cases over these last two years have highlighted some additional situations that are deemed important to discuss. To aid readers familiar with the *2002 Restrictions on Political Campaigning by Public Employees* in determining what is new in this 2004 version, we provide the following list of major changes:

Page(s)	Change
1	Clarified that ORS 260.432 does not specify the amount of work time used to constitute a violation.
1, 2, 4, 17	Clarified that ORS 260.432 applies to initiative, referendum and recall petitions as soon as the prospective petition is filed with the appropriate elections filing officer, even before the petition is approved for circulation.
5	Added guidelines for public employee participation at meetings and presentations at which a ballot measure is discussed or other political activity occurs.
6	Clarified restrictions on a government agency publishing the elected official's resolution that advocates a political position.
7	Added clarification that if the work performed by a public employee falls generally within the job duties of the public employee, then it is assumed that the work is performed in an official capacity, regardless of the time of day or location. A salaried, executive or management level employee will be considered conducting official agency business , if they prepare an official agency publication intended to be distributed using public resources, even if they use what they consider personal time and use personal equipment.
9	Added discussion of visits by candidate or candidate representative.
11	Added a suggested, optional disclaimer for ballot measure documents reviewed by the Secretary of State's office for purposes of impartiality.
12-13	Added additional guidelines in ensuring impartial information has a balance to the information , including a note that such information should address all aspects of a measure rather than only selected aspects; the types of information that should be included if a measure proposes to affect taxes or fees; the inclusion of other options in a impartial manner; and concerns about side-by-side comparisons of plans.
15	Added a note that caution should be used in formatting (the use of underlining, bolding, font size etc.)
17	Added information and cautions on the use of postcards and separate pieces in an election issue information effort.
17	Added explanation that it is not allowable for a public agency to incorporate political advocacy material just because it has been previously published by a private entity, such as a newspaper. Added cautions about the use of any previously published materials , such as found in private newspaper articles, legislative analysis, surveys and background information prior to a governing body's referral of a measure. Added clarification of when ORS 260.432 is applicable in different circumstances.
18	Added a section on video and audio productions.
18	Added more information about website information.

EXAMPLES OF INADVISABLE LANGUAGE

Following are some examples of inappropriate words and phrases, along with the reasons they are inappropriate, in publications about ballot measures produced by governing bodies. This list is not all-inclusive but will help provide additional guidance in assuring impartiality. (Emphasis added in each example.)

- “With this measure you will pay the same low amount,” “You will still get the same great service,” and “Passage of this measure is critical as the needs of our district are urgent.” Adjectives that qualify such as “low” and “great” included in these sentences are not necessary to relay the factual information, rather they serve to add a persuasive tone. Informational documents produced by governing bodies should be as dispassionate as possible, even if the adjectives used are accurate. Other adjectives that may be inappropriate are “serious,” “critical need” and “important.” In an informational document the reader should be left on their own to come to the conclusion that the issues are important, rather than the information including impassioned descriptions.
- “Maintenance of library funding is requested,” or “Measure 99-72 is a request for voter approval of a revenue bond to pay for construction of the first phase.” The word “requested” and the phrase “request for voter approval” are suggestive of appeals in favor of the measure. Suggested alternatives are, “The purpose of the levy is to maintain library funding” and “Passage of Measure 99-72 would authorize a revenue bond to pay for construction of the first phase.”
- “This measure will renew the support for public libraries.” Use of the phrase “support for” lends a positive tone in favor of the measure. A suggested alternative is, “The levy is being proposed to maintain library funding for three more years...”
- “The county is asking (or seeks authorization from) voters to approve funding that will maintain the current level of services.” This wording is persuasive as it implies that the county is asking voters to approve the measure. A suggested alternative is, “Measure 99-84 is proposed to maintain the current level of services.”
- “We can’t afford to wait,” and “Why is the school bond so important?” These sentences are overly emotional, a matter of opinion, and therefore persuasive. The voters, upon a presentation of impartial factual information, should make this judgment themselves.
- “The District Board believes this solution would receive public support.” This may be a true statement, however it lends itself to a persuasive tone, because of the implication that the District is suggesting this solution is worthy of public support. The inclusion of the term “public support” in and of itself lends a positive tone.
- “The best way to relieve overcrowding is to build a new high school.” This sentence inappropriately uses the word “best” to qualify and describe the proposal. A suggested alternative is, “This measure proposes to address overcrowding in our schools by building a new high school.”
- “City of Anytown Public Schools are FULL.” The words of this sentence are not necessarily advocacy, however this sentence illustrates how the formatting and emphasis of words can contribute the tone of a document being persuasive.

EXAMPLES OF INADVISABLE LANGUAGE (continued)

- “Partners like you ... assure that our community.... can rely on quality of life we live here...” (Emphasis added.) We advise you to omit this sentence as it is persuasive – personalized and emotional.
- “Preserve, Protect and Maintain.” This heading, which seems to be the slogan for what this bond is about, is almost too short and so doesn’t convey neutrally what the measure does – it just seems to promise that this bond would do these positive things.
- “Faced with shrinking financial resources.”
- “Just as it is important to protect our personal investment in our cars and our homes, it is important that our community protect its investment in _____.”
- “Prosecuting Offenders for Better Public Safety.”

STATUTE

ORS 260.432

ORS 260.432(1) states:

“No person shall attempt to, or actually, coerce, command or require a public employee to influence or give money, service or other thing of value to promote or oppose any political committee or to promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder.”

ORS 260.432(2) states:

“No public employee shall solicit any money, influence, service or other thing of value or otherwise promote or oppose any political committee or promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views.”

ORS 260.432(3) states:

“Each public employer shall have posted in a conspicuous place likely to be seen by its employees the following notice in printed or typewritten form:”

(see attached notice)

ORS 260.432(4) states:

“As used in this section:

(a) ‘Public employee’ does not include an elected official.

(b) ‘Public employer’ includes any board, commission, committee, department, division or institution in the executive, administrative, legislative or judicial branch of state government, and any county, city, district or other municipal corporation or public corporation organized for a public purpose, including a cooperative body formed between municipal or public corporations.”

**Checklist Recommended For Reviewing Draft Documents About Ballot Measures
Produced By Government Agencies (ORS 260.432) (updated 1/21/04)**

Note: this is a summary of factors to review for. Review the memorandum, "Restrictions on Political Campaigning by Public Employees," for detailed advice in each category.

Check your draft document about a ballot measure for the following factors:	
a.	Timing of the publication.
b.	Must not contain any explicit language urging a yes or no vote for the measure. Some examples are provided in the detailed memorandum referenced above.
c.	Balance of factual information - include cost to taxpayer with specific examples, address all aspects of a measure rather than just selected aspects, include other options in an impartial manner.
d.	Overall impression of neutrality, not persuasive or speculative , and backed up as appropriate by citations of source of information or some substantiating information or citation to authority to which a voter might refer to confirm the statements.
e.	Tone of the publication , dispassionate rather than enthusiastic.
f.	Should not be personalized or use personalizing pronouns , advise against personalized letter format. Do not use personal words like, "our," "we," "I," "us," etc.
g.	Should not use the word "will," in describing the results of passage of the measure - the word "would" is a better alternative.
h.	Should not, in most contexts, use the word "need," in describing the purpose of the measure. Offer basic facts and let readers make own assessment of what is "needed."
i.	Should not lend a positive (or negative) tone by use of headings, lead lines, words or phrases.
j.	Should not include quotes, even from elected official.
k.	Graphics, checkmarks and photographs - graphics and photographs used must not express advocacy and checkmarks should not be used at all.
l.	Should not include phrases similar to campaign slogans , if expresses advocacy.
m.	Information about how to contact supporting or opposing political committees , should not be included unless both sides are listed.
n.	Reporting of an elected official's position on a ballot measure or an elected official's article advocating a position on a measure should not be included.
o.	Information about the "50% voter turnout requirement," needs to be correct and impartially worded.

We want to extend an offer to governing bodies to review any draft material about ballot measures prior to its publication. We hope the advice we offer will be helpful and prevent concerns or complaints by the public.

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DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

October 5, 1993

Colleen Sealock, Director
Elections Division
Office of the Secretary of State
Room 141 State Capitol
Salem, OR 97310

RE: Statutory Restrictions on Promoting or
Opposing Ballot Measures

Dear Ms. Sealock:

Oregon voters will face a number of contentious ballot measures at upcoming elections, and some of these measures will effect, directly or indirectly, the operation of state and local government. You have asked what restrictions may apply to public officials promoting or opposing ballot measures.

1. Statutory Restrictions on Public Employee Political Activities

ORS 260.432^{1/} prohibits political activities by public employees while "on the job during working hours." In addition, ORS 294.100(1) makes it unlawful for "any public official" to spend public funds for any purpose not authorized by law, and subsection (2) of that statute makes public officials personally liable for money improperly spent. This statute has been found by Oregon courts to apply to public officials who used public funds either to support or oppose measures which were before the voters.

ORS 260.432^{2/} provides, in relevant part:

(1) No person shall attempt to, or actually, coerce, command or require a public employee to influence or give money, service or other thing of value to promote or oppose any political committee or to promote or oppose the nomination or election of a candidate, the adoption of a measure or the recall of a public office holder.

(2) No public employee shall solicit any money, influence, service or other thing of value or otherwise promote any political committee or promote or oppose the

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nomination or election of a candidate, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views.

* * * * *

(4) As used in this section:

(a) "Public employee" does not include an elected official.

(b) "Public employer" includes any board, commission, committee, department, division or institution in the executive, administrative, legislative or judicial branch of state government, and any county, city, district or other municipal corporation or public corporation organized for a public purpose, including a cooperative body formed between municipal or public corporations.

(Emphasis added.)

Thus, ORS 260.432 prohibits "public employees" from promoting or opposing the adoption of a measure while on the job during working hours. It also prohibits "any person" from requiring or attempting to require a public employee to give money, service or anything of value to promote or oppose the adoption of a measure.

2. Who is a "Public Employee" Subject to these Restrictions?

We believe that "public employee," as used in ORS 260.432, includes not only rank and file employees but also supervisors, appointed agency administrators and appointed board and commission members at both the state and local government level.³¹ ORS 260.432(4) provides that "public employee" does not include elected officials. The implication of this definition is that "public employee," for purposes of ORS 260.432, does include all state and local government public employees and officials other than elected officials. For example, appointed members of state boards and commissions are included within this definition, but elected local school board members are not included. This result is consistent with the Attorney General's conclusion in a 1968 opinion that a member of the Industrial Accident Advisory Committee, a public appointee, is a public employee for purposes of ORS 260.432. 33 Op Atty Gen 473 (1968).

Thus, only elected officials lawfully may engage in advocacy for or against a ballot measure while on the job during working hours. However, even elected officials may not "coerce, command or require a public employee to influence or give money, service or other thing of value to promote or oppose * * * the adoption of a measure." ORS 260.432(1).

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3. Penalties

The penalty for failure to comply with ORS 260.432 potentially is quite severe. ORS 260.995 authorizes the Secretary of State to impose a civil penalty of up to \$250 for each violation of ORS 260.432. However, the more significant potential⁴ penalty is found in ORS 294.100(1), which provides:

(1) It is unlawful for any public official to expend any money in excess of the amounts, or for any other or different purpose than provided by law.

ORS 294.100(2) makes public officials who violate subsection (1) civilly liable for money improperly spent, and authorizes suit by the district attorney or taxpayers to seek recovery of that money from the officials who authorized the expenditure.

Oregon courts on several occasions have found this statute to apply to public officials who used public funds either to support or oppose measures which were before the voters. In Porter v. Tiffany, 11 Or App 542 (1972), the Court of Appeals held that members of the board of directors of the Eugene Water and Electric Board (EWEB) were personally liable under ORS 294.100 for EWEB funds spent in connection with two ballot measures. One of those measures authorized the sale of bonds to be used by EWEB to acquire a partial interest in a nuclear power plant. The EWEB funds were used for television, radio and newspaper advertising, voter surveys and other materials to support a favorable vote on the measure. The other measure would have delayed the construction of a nuclear power plant for four years. EWEB used its funds for advertising, polls and other materials in opposition to this measure. The court found that the board had no authority to authorize payments for these activities, and ordered the board members personally to reimburse EWEB for the amount expended in promoting or opposing the measures.

Burt v. Blumenauer, 299 Or 55 (1985), involved a taxpayer suit under ORS 294.100 against three county commissioners, the county executive, and two county health officers for unlawful expenditure of public funds. The money was used to pay the salaries for persons, including one of the health officials, who staffed a "fluoridation public information project," and to pay for advertising, posters and polls to promote the benefits of fluoridation. This "information project" was undertaken at a time when an anti-fluoridation measure was on the City of Portland ballot. The court, citing ORS 260.432, found that if the officials established the "information project" with the purpose of opposing adoption of the anti-fluoridation measure, they would be subject to personal liability for public funds spent to oppose the measure. The case was remanded to the trial court to determine whether the expenditures were, in fact, made for the purpose of opposing the measure.

Note that in both of these cases some of the defendants were elected officials. ORS 260.432(4) was amended to exclude elected officials from the definition of "public employee" after these cases were decided. Nevertheless, this change in the law would almost certainly not have changed the results of these cases. We believe that the exclusion of elected officials from the

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definition of public employee permits elected officials to give speeches or interviews in which they urge support of or opposition to ballot measures, even when those activities take place "on the job during working hours." We do not believe, however, that elected officials may direct that public resources, including use of public employee's time, be used to support or oppose the measure. This would appear to result in violation of ORS 260.432(1) by the elected official and ORS 260.432(2) by the public employee.

4. Permitted Activities

This is not to say that public officers and employees must remain entirely silent with regard to measures pending before the voters. The Attorney General has concluded that public bodies may use public funds to inform voters of facts pertinent to a measure, if the information is not used to lead voters to support or oppose a particular position in the election.⁵¹ See 35 Op Atty Gen 169 (1970), discussing use by a school district of district funds to inform voters of facts relevant to a school budget election. However, we also have pointed out that "informational" material may be found to "promote or oppose" a measure even if it does not do so in so many words, if the information presented to the public clearly favors or opposes the measure and, taken as a whole, clearly is intended to generate votes for or against the measure. Letter of Advice OP-3322 to Ray Robinett, Washington County District Attorney, July 24, 1975.

Moreover, ORS 260.432(2) specifically states that it does not restrict the right of public employees to express their personal political views. Thus, public employees may campaign for or against measures or candidates in their individual, as opposed to official, capacity while off the job. The Department of Justice also has concluded that the last sentence of ORS 260.432(2) authorizes public employees to express their personal political views while on the job, through such activities as wearing campaign buttons, subject to limited regulation by the public employer to the extent necessary to avoid interference with the employee's duties and the employer's mission. Letter of Advice to C. Gregory McMurdo, Deputy Secretary of State, October 10, 1984 (OP-5750). We also believe that a public employer may establish policies restricting expression of personal political views by employees where such expression reasonably may be interpreted by others as officially endorsed by the public employer. For example, an agency might have policies prohibiting its receptionist from displacing a political poster in his or her work area in view of the general public, or prohibiting uniformed employees from wearing any badge, insignia or button, political or otherwise, which is not an authorized part of the uniform.

Of course, an agency or other public body also must have legal authority for any expenditure of public funds. That is, the expenditure must be for the purpose of carrying out a task or program given to the public body by the legislature or by its charter or other enabling act. When there is a question whether the expenditure may be for the purpose of affecting the vote on a measure, there is some indication that Oregon appellate courts will apply a strict standard in determining whether the agency has legal authority to make the expenditure. In Porter v. Tiffany, supra, for example, EWEB was authorized by the city charter to "improve, extend, enlarge, and acquire water and

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electrical utilities systems * * * *. The court held that this language did not authorize EWEB to support a ballot measure to raise money to extend electrical service, because the power to raise money for this purpose was given to the city council, rather than to EWEB. Likewise, the legislature and the Governor have the responsibility for assuring adequate funds for operation of state government agencies. Thus, even purely informational activities related to a ballot measure should be carefully examined to ensure that the public body has statutory or other legal authority to engage in those activities.

5. Conclusion

In summary, public employees, including non-elected officials, may not support or oppose measures pending before the voters "while on the job during working hours." Public employees may campaign for or against measures or candidates while off the job, in their individual capacity. They may express their personal political views while on the job through such activities as wearing campaign buttons, subject to limited regulation by the employer to avoid disruption of the workplace or suggesting to members of the public that the employee's personal political views are endorsed by the public employer. In addition, public bodies generally may provide information to the public concerning their activities. However, when the information relates to a measure before the voters, special care should be taken to ensure that the information is fairly presented and is not used to lead voters to support a particular position in the election. In view of the potential financial penalties for violation of ORS 260.432 and 294.100, we urge agencies to consult with counsel before embarking on any informational program related to a ballot measure.

Sincerely,

Is: DONALD C. ARNOLD

Donald C. Arnold
Chief Counsel
General Counsel Division

DCA:bjs/JGG07C41
cc: Theodore R. Kulongoski, Attorney General ✓

¹⁷ Federal law also limits the political activities of certain state and local government employees. See 5 USCA § 1501 et. seq. These statutes apply generally to officers and employees of state and local government executive branch agencies, boards, commissions or departments which are financed in whole or in part by federal loans or grants, but excluding educational and research agencies. The restrictions in these statutes are similar to, although in some respects stricter than, the provisions of ORS 260.432.

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^{2/} This statute was amended by Or Laws 1993, ch 493, § 106 to add "gathering of signatures on an initiative, referendum or recall petition" to the list of activities referenced in ORS 260.432(1), (2) and (3). This amendment is effective November 4, 1993.

^{3/} The Oregon Court of Appeals has held that ORS 260.432 applies to both state and local government employees, and that it preempts any inconsistent local government ordinance. Williams v. City of Astoria, 43 Or App 745 (1979).

^{4/} ORS 294.100 is found in a chapter relating to county and municipal finances, yet it is applicable to "public officials" generally. We believe it is likely that the statute would be found to apply to all public officials. Even if it does not, however, other statutes which lead to the same result clearly do apply to state officers. ORS 293.515, for example, authorizes the Governor to withhold the salary of state officers or employees who fail to settle accounts with respect to disposition of public funds or property when use of those funds or property is questioned by the Secretary of State during his audit of the agency. Similarly, ORS 293.260 authorizes the Secretary of State to require persons who have received moneys or property belonging to the state for which they have not properly accounted to return the money or property to the state.

^{5/} Oregon election law recognizes that certain public bodies may provide informational material concerning measures which they have referred to the voters. ORS 260.522(3)(b) provides an exemption from certain requirements for identification of the source of a political publication for

(b) Any written matter relating to a measure at any election prepared under the direction of the governing body of the city, county or district that referred the measure if the written matter is impartial, neither supports nor opposes passage of the measure and contains the name and address of the city, county or district.

ATTENTION ALL PUBLIC EMPLOYEES:

The restrictions imposed by the law of the State of Oregon on your political activities are that “No public employee shall solicit any money, influence, service or other thing of value or otherwise promote or oppose any political committee or promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views.”

It is therefore the policy of the state and of your public employer that you may engage in political activity except to the extent prohibited by state law when on the job during working hours. (ORS 260.432)