ATTACHMENT 6

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY	02 CV 010774
JACK SMITH, JULIE ROBISON AND TOWN OF CARY, Petitioners, v. STATE BOARD OF ELECTIONS, Respondent.	RESPONDENT'S BRIEF (Tenth District Local Rule 9.3)

The State Board of Elections ("State Board") opposes for the following reasons petitioners' request that its decision be reversed.

NATURE OF THE CASE

This administrative appeal pursuant to N.C. Gen. Stat. §§ 150B-43 & -45 is from an order of the State Board made on July 13, 2002, in which it ordered petitioners Robison and Smith to reimburse the Town of Cary for contributions they had received from it in excess of $4,000 following the town's elections in 2001. (R. p. 124) In so ordering, the State Board concluded that the Town of Cary was an "entity" within the meaning of N.C. Gen. Stat. § 163-278.13(b). This statute provides: "No candidate or political committee shall accept or solicit any contribution from any individual, other political committee, or other entity of any money or any other contribution in any election in excess of four thousand dollars ($4,000) for that election." (emphasis supplied) The State Board declined to consider the question of whether the Town of Cary, as a municipal corporation, was barred from making any political contributions under N.C. Gen. Stat. § 163-278.19. (R. pp. 33, 124) In rendering its decision the State Board expressed concerns about whether the Town of Cary had authority to adopt a public financing plan without enabling legislation from the General Assembly. It did not address that issue, however, because it agreed with its Executive Director that the question was not within its jurisdiction. (R. pp. 122, ¶ 2; 124, ¶ 12)

The decision of the State Board was reached after multiple communications about how the Town of Cary's public financing scheme fit with the campaign finance statutes adopted by the General Assembly. The Town of Cary adopted Ordinance 00-028 in December 2000, and amended it in June 2001, for implementation in the 2001 municipal elections. Candidates who met the ordinance's requirements would receive municipal funds as reimbursement for campaign expenses. Under N.C. Gen. Stat. § 163-278.22 (12), the State Board is required "[t]o assist county boards of elections in resolving questions arising from the administration of the [campaign reporting statutes]." Since the Town of Cary is located in Wake County, the Campaign Finance Director for the Wake County Board of Elections raised questions in May 2001 about implementing the ordinance in the context of statutory reporting requirements for

municipal campaigns. (R. p. 1)

Over several months, e-mails and other correspondence, telephone calls, and meetings on the issue took place. These communications involved, at one time or another, the Executive Director and other staff of the State Board, representatives of the Wake County Board of Elections, the Cary Town Clerk, and attorneys including Mr.Crowell representing the Town of Cary, Bill Gilkeson of the legislative staff, and the undersigned representing the State Board. See R. pp. 1-32. The discussions culminated in a letter from Gary Bartlett, the Executive Director of the State Board to Angela Pace, the director of campaign financing for the Wake County Board of Elections, on July 17, 2001, in which he concluded that the question of whether the Town of Cary was an entity subject to N.C. Gen. Stat. § 163-278.13(b) was a concern but not ripe for determination because no candidate had applied for the reimbursement and no money had been paid in excess of the statutory limit. He further indicated that the State Board would not take the position that the Town of Cary "is a 'corporation' within the meaning of campaign reporting laws, so as to bar its contributions under GS 163-278.15 or GS 163-278.19." (R. pp. 33-34) Shortly thereafter e-mails between the Wake County Attorney's Office and the Town of Cary's Attorney's office indicated that the Town's council had been warned "that there may be a legal challenge to the ordinance." (R. p. 36) Nevertheless, there was no court challenge to the authority of the Town of Cary to provide for public financing. In addition, no request pursuant to N.C. Gen. Stat. § 163-278.23 for a binding written opinion from the Executive Director regarding compliance with the campaign finance statutes was made by any candidate, political committee, or the Town.[1]

Final campaign reports were filed by the candidate-petitioners in January 2002. (R. pp. 45-55) This precipitated an audit by the Wake County Board of Elections, which resulted in letters dated April 17, 2002, to the candidate-petitioners from Gary Bartlett in which he requested them to return sums received from the Town of Cary in excess of $4,000. (R. pp. 60-63) The Town of Cary, through Mr. Crowell, requested that any further action in the matter be stayed until it could be considered by the State Board. The State Board scheduled the matter for hearing on June 25, 2002. Before the meeting the State Board was provided with briefs from John McMillan representing the candidate-petitioners (R. pp. 90-105) and Michael Crowell representing the Town of Cary (R. pp. 106-111) . In addition, on May 31, 2002, Nelson Dollar,[2] a registered voter and candidate in the 2001 Cary elections submitted a complaint in which he argued that the Town of Cary had illegally contributed to the campaigns of three candidates. (R. pp. 69-72) The State Board considered these briefs, as well as the statements of Mr. Crowell, arguments of Mr. McMillan and Mr. Stam, before entering its order concluding that the Town of Cary was an entity subject to the limit set forth in N.C. Gen. Stat. § 163-278.13(b). (R. pp. 118-19, 122) The State Board further found that "there is no apparent violation of election law that

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[1] "[C]andidates, the communications media, political committees, referendum committees, or other entities" may request such an opinion if they are uncertain of the applicability to them of a campaign reporting statute. This statute was not provided for the benefit of county elections officials because other statutes specifically provide that they are subject to the direction, assistance, and supervision of the State Board. *See, e.g.* N.C. Gen. Stat. §§ 163-22 & -278.22.

[2] Mr. Dollar has not chosen to intervene in this administrative appeal.

would rise to the level of intentional criminal conduct upon the part of the two candidates." (R.p. 123, ¶ 9)

ARGUMENT

Standard of Review

The standard of review by a trial court of a final decision of an administrative agency is governed by N.C. Gen. Stat. § 150B-51(b). "[T]he court may affirm the decision of the agency or remand the case to the agency . . . for further proceedings. It may also reverse or modify the agency's decision . . . if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions" have violated one of six standards. Petitioners do not specifically reference in their brief the subsections of section 150B-51(b) which they contend that the State Board's decision violates, but their argument appears to assert violations of subsections (3)("unlawful procedure"), (4)("error of law"), and (6)("[a]rbitrary, capricious, or an abuse of discretion"). The State Board contends that it violated none of these standards.

The State Board did not engage in rule making when it applied the language of N.C. Gen. Stat. § 163-278.13(b) to the candidate-petitioners.

Petitioners contend the State Board imposed an unpromulgated rule in concluding that the Town of Cary was an "entity" subject to the contribution limit set forth in N.C. Gen. Stat. § 163-278.13(b). In North Carolina ex rel. Comm'r of Insurance v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980), the North Carolina Supreme Court distinguished between legislative rules and interpretive rules. Interpretive rules are excluded from rulemaking under North Carolina's Administrative Procedure Act. Id. at 411, 269 S.E.2d at 568. See also Beneficial North Carolina, Inc. v. State ex. rel. N.C. State Banking Commission, 126 N.C. App. 117, 124, 484 S.E.2d 808, 812 (1997); N.C. Gen. Stat. § 150B-2 (8a). "Legislative rules fill the interstices of statutes. They go beyond mere interpretation of statutory language or application of such language and within statutory limits set down additional substantive requirements." 300 N.C. App. At 411, 269 S.E.2d at 568 (quoting Charles E. Daye, North Carolina's New Administrative Procedure Act: An Interpretive Analysis, 53 N.C. L. Rev. 833, 899 (1975)).

The State Board in the instant case merely applied the plain language of the statute and did not set down a new substantive standard. N.C. Gen. Stat. § 163-278.13(b) prohibits a candidate from accepting any money in excess of $4,000 for an election from "any individual, political committee, or other entity." The word "entity" is not defined in Article 22A of Chapter 163, although the term "business entity" is broadly defined as "any partnership, joint venture, joint-stock company, company, firm, or any commercial or industrial establishment or enterprise." N.C. Gen. Stat. § 163-278.6 (3). "Entity" is defined in normal legal usage as "[a]n existence; a being, actual or artificial." Ballentine's Law Dictionary (3rd ed. 1969). It cannot be denied that the Town of Cary is a legally recognized entity. See, e.g. N.C. Gen. Stat. § 160A-1 ("'City' means a municipal corporation organized under the laws of this State for the better government of the people within its jurisdiction and having the powers, duties, privileges, and immunities conferred by law on cities, towns, and villages.") Thus, when the State Board concluded it was covered under the statute it was not establishing a new standard, but was merely applying the plain language of the statute.

The State Board's decision that contributions to candidates made by the Town of Cary were

subject to the campaign reporting statutes was not incorrect as a matter of law.

Petitioners agree that the critical question is whether the Town of Cary is an "other entity" prohibited from providing more than $4,000 in public financing and that the issue of public funding of municipal elections is nowhere directly addressed in the statutes. They argue that the adoption of a public funding scheme for state-level offices in 1988, although repealed in 2002, is significant because it did not amend the statute to state that the $4,000 limit did not apply to the public funding scheme. The problem with this argument is that N.C. Gen. Stat. § 163-278.13(b) did not include the words "other entity" until is was amended in 1999.3 Section 5(c) of Session Law 1999-31 rewrote § 163-278.13(b) to add the words "other entity." See Attachment A. Until then the prohibition had only applied to individuals and political committees. The phrase was added because other parts of Session Law 1999-31 revised the campaign reporting statutes to allow contributions by "an entity" that met the requirements of N.C. Gen. Stat. § 163-278.19(f). Thus, it was not necessary in 1988 for the legislature to amend N.C. Gen. Stat.§ 163-13 when it enacted the public financing scheme for state officers because by the plain terms of the statute it only applied to individuals, candidates and political committees.

Petitioners further argue that the General Assembly did not intend to cover public financing when it enacted Session Law 1999-31. Defendants agree that public financing was not directly addressed in this session law, but disagree with petitioners' assertion that the purpose of the session law was "to reduce the number of entities to which the $4,000 limitation applied, not to broaden it." Petitioners' Brief at 10. A more accurate statement of the purposes of Session Law 1999-31 and Session Law 1999-453, another revision to the campaign reporting statutes that complemented the earlier legislation in the same session (Attachment B), is that the General Assembly sought to provide for the fullest disclosure and greatest limits on contributions permitted under the United States Constitution as interpreted by recent court decisions.

Recognizing that the statutes do not directly address public funding, the State Board was left with applying the language in N.C. Gen. Stat. § 163-278.13(b). It is fundamental that rules of statutory construction do not apply unless an ambiguity exists. Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). "Where the language of a statute is clear and unambiguous, there is not room for judicial construction and the courts must construe the statute using its plain meaning." Id. If the statute is found to be ambiguous, then principles of statutory construction must be used to give effect to the legislative intent. "This intent 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.'" Id. (quoting Milk Commission v. Food Stores, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). The State Board chose to rely on the plain words of the statute, finding them to be unambiguous. Since the Town of Cary is an entity and nowhere exempted from the limitation in N.C. Gen. Stat. § 163-278.13 (b), the State Board members unanimously concluded it was applicable to the candidate-petitioners. (R. p. 119)4

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[3]By this time it was recognized that the experiment in public financing of gubernatorial and Council of State campaigns had failed because insufficient funds were available for such campaigns.

[4]The afffidavit of Rep. Baddour is not relevant to the issue of the proper interpretation of

Finally, the State Board has no duty to "encourage controls on the excesses of campaign financing." Petitioners' Brief at 12. The State Board's duty is to administer the campaign reporting statutes enacted by the General Assembly, and to investigate and report apparent intentional violations of those statutes. See N.C. Gen. Stat. § 163-278.22. It is supposed to make recommendations to the General Assembly concerning the conduct of elections, N.C. Gen. Stat. § 163-22, but as an agency created by the legislature it has no authority other than that given to it by the legislature.
The State Board properly viewed the question of the authority of the Town of Cary to adopt a public financing scheme as outside its jurisdiction, and did not act arbitrarily and capriciously in nevertheless expressing its concern about the issue.

It cannot be denied that when the State Board made its decision in the instant case it was aware of the legal elephant in the room – the question of whether the Town of Cary had the statutory authority to adopt a public financing scheme. Finding 12 of its order makes it clear that it was concerned about the issue. (R. p. 124) Nevertheless, the State Board did not decide the issue, choosing to apply the statute literally and to allow the candidates to receive the amount allowed by statute. Awareness and concern about a legal issue, and even desire that it would be resolved by those with jurisdiction to decide the question, do not render arbitrary and capricious the State Board's decision to read the statute literally.
It was not fundamentally unfair to request that the candidate-petitioners return the funds received in excess of $4,000.

Petitioners concede that candidates for the Cary council should have known in the summer of 2001 that the authority of the town to provide public funding was open to debate and that, at a minimum, those already on the council knew questions had been raised about the $4,000 limitation. Petitioners' Brief at 17. As explained above, there is a statutory mechanism for a candidate to request an opinion from the Executive Director of the State Board that will be binding when the candidate is unsure or concerned about the applicability of a campaign reporting statute to a given set of facts. See N.C. Gen. Stat. § 163-278.23. The candidates, their political committees, and other entities would then be entitled to rely on the opinion if they complied with it. The only inquiry the Executive Director received was from an elections official for Wake County, which the State Board advises and supervises, not a third party such as one of the candidate-petitioners in the instant case. It is not clear why the candidates did not take advantage of this opportunity for guidance provided by the statute but they did not do so. Nevertheless, the State Board did not find an apparent intentional violation of the campaign reporting statutes so it made no referral in the matter to a district attorney.

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the statute because in our state courts "[t]he intention of the legislature cannot be shown by the testimony of a member; it must be drawn from the construction of its acts." *Styers v. Phillips*, 277 N.C. 460, 472, 178 S.E.2d 583, 590 (1971). Moreover, agency interpretation of an ambiguous statute should be considered in determining its meaning and given deference. *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E.2d 200 (1973).

Respectfully submitted, this the 27th day of November 2002.

Roy Cooper
Attorney General

Susan K. Nichols
Special Deputy Attorney General
N.C. State Bar No. 9904
snichols@mail.jus.state.nc.us

N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6890
Facsimile: (919) 716-6755

Counsel for Respondent