

MINUTES

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2 The State Board of Elections Board Meeting was held on Friday, August 23,
3 2013. The meeting was held in the General Assembly Building, Room D, in Richmond,
4 Virginia. In attendance, representing the State Board of Elections (SBE) was Charles
5 Judd, Chair; Kimberly Bowers, Vice Chair; Donald Palmer, Secretary; Joshua Lief;
6 Senior Assistant Attorney General & SBE Counsel; Justin Riemer, Deputy Secretary;
7 Nikki Sheridan, Confidential Policy Advisor; Chris Piper, Election Services Manager;
8 Susan Lee, Election Uniformity Manager; Martha Brissette, SBE Policy Analyst; and
9 Gary Fox, Voter Technology Coordinator. Chairman Judd called the meeting to order at
10 10:00a.m.

11 The first order of business was the approval of the SBE Board Minutes from the
12 August 13, 2013 Board Meeting. Chairman Judd asked if Board Members had any
13 additions or corrections to the August 13, 2013 Board Minutes. Vice Chair Bowers stated
14 that she had a couple of corrections and additions. Vice Chair Bowers noted for the
15 record the changes desired to the Board Minutes draft document. Vice Chair Bowers
16 stated that on line 341 she desired an additional clarification of what was stated. Vice
17 Chair Bowers stated that she would like the Minutes to read: Vice Chair Bowers stated
18 that she appreciated Mr. Lief’s answers but that 2012 had nothing to do with her concerns
19 or the future implications of the conflict of having the Attorney General as a current
20 candidate while still having the full authority to investigate election matters and have
21 representative counsel to SBE. Secretary Palmer stated that the audio would require
22 reviewing and SBE has not posted the Minutes and SBE was within the 10 day
23 requirement and SBE would not be able to formally adopt the Minutes of the August 13,
24 2013 Board Meeting during this proceeding. Chairman Judd replied “Ok”. Vice Chair
25 Bowers stated that since the Minutes have not been formally adopted I would like
26 clarification on line 297 and “I would like the Minutes to reflect the following: Vice
27 Chair Bowers noted that given the Attorney General Offices’ role to serve as counsel to
28 the SBE which is the agency that administers Virginia's election laws, and now given the
29 fact that he has full investigatory powers to investigate without the Boards consent, has
30 the board considered what potential conflicts might arise given the fact that he is now a

31 gubernatorial candidate?” Vice Chair Bowers stated that she would like this statement
32 reflected in the Minutes since this was the gist of what she was asking at the last meeting
33 and was more than willing to have staff take a look at what was stated and she would like
34 the Minutes to accurately reflect her sentiments. Chairman Judd asked if Vice Chair
35 Bowers had copies of those statements to give to the Secretary. Vice Chair Bowers
36 replied: “Yes”. Chairman Judd asked Secretary Palmer if SBE would like to postpone
37 the approval of the Minutes. Secretary Palmer replied that there will definitely be a
38 postponement of the approval of the Minutes. Secretary Palmer stated that he wanted to
39 remind the Board Members that these are a summary of the Minutes: “This is not
40 supposed to be a transcript of the meetings, we have limited resources and to meet the
41 timelines necessary for FOIA, my staff has other things to do other than the Minutes of
42 the Board Meeting”. Chairman Judd stated “OK and that’s on the record”.

43 The second order of business was the Secretary’s Report delivered by Secretary
44 Palmer. Secretary Palmer informed the Board that the SBE IS Division is conducting a
45 comprehensive audit of the deceased similar to the audit conducted in 2012. Secretary
46 Palmer stated that this should be the final audit and we will be shifting our resources to
47 ERIC and we have an ongoing subscription with Social Security. We also have a growing
48 interstate compact on death called STEVE which is an interstate compact of states across
49 the country involving the Department of Health. Secretary Palmer stated that Virginia
50 will be entering this compact in January, 2014. Secretary Palmer stated that during the
51 Pew Foundation Meeting a presentation occurred on the status of ERIC. Secretary Palmer
52 noted that some of the problems noted during this presentation are that 1.8 million
53 deceased individuals were listed as voters across the country and 2.7 million voters are
54 registered in multiple states. Additionally, 12.7 million voter records are out of date and
55 51 million citizens are not registrar to vote. The ERIC project is design to identify where
56 the gaps are in the registration rolls.

57 Secretary Palmer stated that research from the PEW Foundation found that 1 out of 8
58 Americans move each year and 1 out of 4 young Americans move each year and that
59 mobility has increased the problems of trying to keep track of citizen voter registration
60 roles. In the ERIC states, the data showed 764,071 in-state movers identified and over 92
61 thousand cross-state movers. ERIC identified over 23,281 deceased voters and over

62 14,118 in-state duplicates on our (Virginia) rolls despite our best efforts with the 2012
63 and 2013 audits. Secretary Palmer stated that technology is showing SBE where the
64 shortcomings really are and we are still working on the data reports from the interstate
65 compact agreement with 22 other states.

66 Chairman Judd asked if the numbers just cited were these across all the states or
67 just in Virginia? Secretary Palmer stated that these are the numbers related to the seven
68 states involved in the ERIC interstate compact. Secretary Palmer stated that North
69 Carolina, West Virginia, and Washington, D. C. are also considering joining the ERIC
70 compact which would be particularly beneficial to the Commonwealth as they are our
71 neighbors. Secretary Palmer stated that there is an ongoing effort to recruit states and the
72 program is in the infancy stage and that Virginia is a pioneer state in this program. SBE
73 will continue forward and receive and provide data to other states. The IS Division is
74 currently developing structures and guidelines to deal with the information in the future
75 according to the regulations and the law.

76 Secretary Palmer recognized Martha Brissette, SBE Policy Analyst, for her tenure
77 at SBE for six years, thanking her hard work as a policy analyst and attorney at SBE.
78 Secretary Palmer stated that a survey went out on the annual training workshop and that
79 SBE has received the feedback. The training was attended by 450 attendees and 98% of
80 the attendees found the information to be useful and 93% felt better prepared to perform
81 their jobs after their training. Secretary Palmer noted that 45% of the attendees felt that
82 they have a good relationship with SBE after attending and 43% stated that they already
83 had a good relationship. Overall 95% of the attendees stated that the conference was
84 beneficial to them. Secretary Palmer stated that he wanted to thank the staff for all their
85 hard work. Chairman Judd asked if SBE had the numbers from previous training years to
86 make a comparison. Secretary Palmer stated then since he was not at SBE during
87 previous years it would be hard to gauge a precise response but if the attendees were
88 happy, then SBE is happy.

89 Secretary Palmer stated that 37 localities have signed up for the on-line officer of
90 election training and an additional 50 localities asked SBE for more information. The
91 third party registration training has had 358 individuals sign the sworn affidavit
92 indicating that those individuals have taken the training on-line. SBE has conducted a

93 number of classes at SBE which have been well received. Seventy-four individuals have
94 taken the in-house training and 41 organizations have registered with the state. Secretary
95 Palmer stated that the Voter ID Workgroup met on August 20, 2013 and SBE continues
96 to move forward with election officials. Chairman Judd announced that he participated in
97 the third party registration training and passed. Chairman Judd asked if there were any
98 questions and there were none.

99 The next order of business was the Legal Report delivered by Joshua Lief, SBE
100 Counsel. Mr. Lief reported that there were no updates since the Board Meeting on August
101 13, 2013.

102 The next order of business was the Stand By your Ad Violations (Lamont Kizzie)
103 presented by Chris Piper, Election Services Manager. Mr. Piper stated that on June 27,
104 2013, July 3, 2013 and July 18, 2013, SBE received three separate complaints concerning
105 the campaign advertising disclosures allegedly paid for by Lamont Kizzie for Sheriff
106 2013, a candidate campaign committee registered to support Lamont Kizzie for the office
107 of Sheriff in the City of Richmond. The first two complaints were concerning a flyer
108 circulated at the Richmond Greek Festival. The third complaint included the flyer as well
109 as the committee's website, a sign posted on a fence outside a local business, a yard sign
110 and a local newspaper. Mr. Piper stated that the evidence submitted was included in the
111 Board Materials and reference the flyer posted at the Richmond Greek Festival. Mr. Piper
112 noted that the advertisement did not include the disclosure and clearly states elect Lamont
113 Kizzie. Mr. Piper stated that the newspaper ad also advocates for Lamont Kizzie without
114 the disclosure. Mr. Piper stated that the website, although currently updated, did not
115 contain the disclosure as of July 31, 2013. The two other advertisements included a yard
116 sign and one at a private business which did contain the disclosure. Mr. Piper stated that
117 three of the advertisements were in violation of the law and two meet the disclosure
118 requirements. Mr. Piper stated that the committee has committed three violations of the
119 requirements of Chapter 9.5 of Title 24.2, *Code of Virginia*, and should be assessed civil
120 penalties totaling \$550 representing a first time violation at \$50 along with second and
121 third violation at \$250. Mr. Piper asked if there were any questions. Chairman Judd asked
122 about the letter to Mr. Kizzie which cites \$1050 while SBE staff recommendation is
123 \$550: "What is the difference?" Mr. Piper stated that the law requires that SBE provides

124 the candidates with the maximum penalty and based on the Boards' civil penalty
125 schedule staff recommended \$550. Chairman Judd asked if the candidate or a
126 representative was present and they were not. Chairman Judd stated that he had two
127 observations; (i) two of the three complaints were anonymous which has no consideration
128 and (ii) was SBE staff provided with originals? Mr. Piper stated that only copies were
129 provided to SBE staff. Vice Chair Bowers asked whether there was a response from the
130 candidate. Mr. Piper replied "No". Mr. Piper stated that Tony Pham provided all of the
131 copies of the written materials and a link to the website on July 8, 2013. The other two
132 complaints arrived at SBE anonymously. Vice Chair Bowers inquired if the candidate is
133 an active candidate. Mr. Piper stated that Lamont Kizzie is registered with the local
134 general registrar office. Vice Chair Bowers moved that *her recommendation would be to*
135 *follow the SBE staff recommendations and access the \$550 fine.* Secretary Palmer
136 seconded the motion and Chairman Judd inquired if there were any comments. Chairman
137 Judd stated that he was agreeing on the information with the person who signed the letter.
138 Chairman Judd asked if there were any additional comments. Secretary Palmer stated
139 that Lamont Kizzie is ignoring the letter from SBE and thus is continuing to violate the
140 law. Chairman Judd asked if there was a response from Lamont Kizzie and if it could be
141 verified that the certified letter was received. Mr. Piper confirmed that the letter was
142 signed for and that there was not a response. Chairman Judd asked if there were
143 additional comments and there were none. The Board unanimously approved the motion.

144 The next order of business was the Campaign Finance Penalty Waiver Requests
145 (Burgos for Delegate) presented by Chris Piper, Election Services Manager. Mr. Piper
146 stated that the committee was penalized on June 3, 2013 for failure to file a campaign
147 finance report due June 3, 2013 in a timely manner. The committee requests a waiver of
148 the penalty due to the fact they filed only minutes after the deadline. Mr. Piper stated that
149 the request for waiver was included in the Board materials. Mr. Piper noted that the
150 campaign attempted to send the report several times before the 5:00p.m. deadline and
151 received a message that said "invalid request". Mr. Piper stated that in Board policy
152 2001-003, the Board affirmatively stated that, among other reasons, good cause allowing
153 Board waiver of campaign finance civil penalties does not include the committee's lack
154 of knowledge of how to file, the need to file or due date of filing. Mr. Piper noted that

155 the e-filing system on this date was operational and experienced no problems. Mr. Piper
156 stated that the system will automatically assess the penalty for any report that does not
157 have the time stamp of 5:00p.m. Chairman Judd asked if there were any questions. Vice
158 Chair Bowers asked if SBE was finding that this is happening on a frequent basis. Mr.
159 Piper replied that a few campaigns have complained that they have attempted to go into
160 the system minutes before the deadline and experienced problems. Mr. Piper stated that
161 the campaigns are informed of their right to appeal to the Board for a waiver. Mr. Piper
162 stated that, *Code of Virginia*, allows the Secretary to extend the deadline if COMET is
163 experiencing problems. Chairman Judd asked:”What is unique about 5:00p.m.?” Mr.
164 Piper replied that previous Boards’ choose 5:00p.m.as a standard. Secretary Palmer stated
165 that the 5:00p.m. deadline was most likely chosen to accommodate campaigns who hand
166 delivered reports to the SBE offices before the days of all electronic filing. Mr. Piper
167 stated that the 5:00p.m. deadline increased the ability of SBE to disclose the reports to
168 members of the public. Chairman Judd asked how soon the information is electronically
169 available to Virginia Public Access Project (VPAP). Mr. Piper replied that VPAP has had
170 the policy of not providing the reports publically until after the deadline. Chairman Judd
171 asked when is the information available to VPAP. Mr. Piper stated that the reports are
172 produced at 5:05p.m. for both members of the public and VPAP. Vice Chair Bowers
173 asked about “invalid requests”: “Can we verify that the campaign was trying to complete
174 their reporting before 5:00p.m.?” Mr. Piper replied if there was a system error SBE
175 would receive a report. Chairman Judd asked if numerous campaigns were submitting
176 their reports at exactly 5:00p.m.is there a potential for a report to be logged at 5:01p.m.
177 Mr. Piper replied that there is a possibility.

178 Chairman Judd queried the Board Members of their thoughts on the 5:00p.m.
179 deadline. Chairman Judd asked how many fines have been levied due to campaigns
180 missing the 5:00p.m. deadline with COMET. Mr. Piper replied that he did not have those
181 exact numbers immediately available and stated that there have been approximately two
182 or three violations each of the last 10 cycles. Vice Chair Bowers stated that because they
183 are not occurring as frequently as previously thought she is leaning towards leniency
184 when the candidate is stating they are trying to file a report and the report actually arrives
185 within minutes of the deadline. Secretary Palmer stated he has experienced deadlines set

186 at midnight and SBE deadlines are so that SBE can process the information for VPAP
187 and the public. Secretary Palmer stated that he was open to moving the deadline.
188 Chairman Judd stated that he is not inclined to move the deadline during this Board
189 Meeting but, believes a review of this procedure should occur and would encourage SBE
190 to bring a proposal to a future Board Meeting. Secretary Palmer moved that the *Board*
191 *uphold the penalty assessed and recommended by SBE staff*. Vice Chair Bowers
192 seconded the motion and Chairman Judd inquired if there were any comments and there
193 were none. The Board unanimously carried the motion.

194 The next order of business was the Campaign Finance Penalty Waiver Requests,
195 Citizens for Accountability in Politics, presented by Chris Piper, Election Services
196 Manager. Mr. Piper stated that the committee was penalized on April 16, 2013 for failure
197 to file a finance report due April 15, 2013 in a timely manner. The committee requests a
198 waiver of the penalty due to the fact they sent in the wrong report year. Mr. Piper stated
199 that in Board policy 2001-003, the Board affirmatively stated that, among other reason,
200 good cause allowing Board waiver of campaign finance civil penalties does not include
201 the committee's lack of knowledge of how to file, the need to file or due date of filing.
202 Mr. Piper stated that staff recommendation is to uphold the penalty assessed. Chairman
203 Judd asked if there was a representative from the campaign present and there was not.
204 Vice Chair Bowers moved that the *Board uphold the penalty assessed and recommended*
205 *by SBE staff*. Chairman Judd seconded the motion and inquired if there were any
206 comments and there were none. The Board unanimously carried the motion.

207 The next order of business was the Campaign Finance Penalty Waiver Requests
208 (Peschke for Delegate) presented by Chris Piper, Election Services Manager. Mr. Piper
209 stated that the committee was penalized on June 3, 2013 for failure to file a Campaign
210 finance report due June 3, 2013 in a timely manner. The committee requests a waiver of
211 the penalty due to the fact that he wasn't sure he was going to be a candidate until June 1,
212 2013. Mr. Piper stated that the committee was registered prior to May 31, 2013 which
213 was the last day of the reporting period. Mr. Piper stated that Mr. Peschke was raising
214 and or spending funds prior to June 1, 2013. Mr. Piper stated that a report would be
215 required. Mr. Piper stated that in Board policy 2001-003, the Board affirmatively stated
216 that, among other reason, good cause allowing Board waiver of campaign finance civil

217 penalties does not include the committee's lack of knowledge of how to file, the need to
218 file or due date of filing. Mr. Piper stated that staff recommendation is to uphold the
219 penalty assessed. Chairman Judd asked if there was a representative from the campaign
220 present and there was not. Vice Chair Bowers moved that the *Board uphold the penalty*
221 *accessed and recommended by SBE staff*. Secretary Palmer seconded the motion and
222 Chairman Judd inquired if there were any comments and there were none. The Board
223 unanimously carried the motion.

224 The next order of business was the Campaign Finance Penalty Waiver Requests
225 (Virginia Automatic Merchandising Association (VAMA) PAC) presented by Chris
226 Piper, Election Services Manager. Mr. Piper stated that the committee was penalized on
227 April 15, 2013 for failure to file a large dollar contribution finance report due April 15,
228 2013 in a timely manner. The committee requests a waiver of the penalty due to the fact
229 they attempted to file on time. Mr. Piper stated that staff recommendation is to uphold the
230 penalty assessed. Chairman Judd asked if there was a representative from the campaign
231 present and there was not. Chairman Judd moved that the *Board uphold the penalty*
232 *accessed and recommended by SBE staff*. Vice Chair Bowers seconded the motion and
233 Chairman Judd inquired if there were any comments and there were none. The Board
234 unanimously carried the motion.

235 The next order of business was the Citizen Webster Complaint Against DPV &
236 McAuliffe for Governor presented by Chris Piper, Election Services Manager. Mr. Piper
237 stated that on July 19, 2013, staff at the State Board of Elections received an email
238 complaint about an advertisement which ran on TV allegedly paid for by the Democratic
239 Party of Virginia. The complaint claims that the committees may be in violation of
240 provisions of the Campaign Finance Disclosure Act of 2006 ("the Act") and/or § 24.2-
241 955 et al (aka "Stand By Your Ad") depending on how the Democratic Party of Virginia
242 reported its expenditure for an advertisement allegedly opposing Ken Cuccinelli for
243 Governor. Further, the complaint alleged that McAuliffe for Governor was failing to
244 disclose the name of the person contracting for or arranging the expenditure for the
245 campaign as required by § 24.2-947.4(C)(3). Mr. Piper stated that in summary there was
246 an advertisement run by the McAuliffe campaign that did not have the required

247 disclosure and the caller stated that the McAuliffe campaign was not disclosing the name
248 of the person who has authorized their expenditures on their campaign finance reports.

249 Chairman Judd asked Mr. Piper to address the two issues separately. Mr. Piper
250 stated that there is a link to the advertisement in the Board materials and that the ad
251 appeared at least once on or about July 13, 2013. Mr. Piper states that the ad states that it
252 was sponsored by the Democratic Party of Virginia but does not state that it was
253 authorized by any candidate. The complainant infers that the lack of an authorization
254 statement means that the committee has made an independent expenditure and thus an
255 independent expenditure report is required under § 24.2-945.2. The complainant points
256 out that the Democratic Party of Virginia did not submit an independent expenditure
257 report which has been confirmed by SBE staff. The complainant further states that the
258 absence of an independent expenditure report infers that the party committee made an in-
259 kind contribution to the Terry McAuliffe for Governor campaign committee, but that the
260 campaign failed to disclose this contribution on their campaign finance reports. A review
261 of the Terry McAuliffe for Governor campaign committee shows that no such in-kind
262 contributions were reported by the committee. The complainant believes that one or both
263 committees are in violation of the Act and Stand By Your Ad. Mr. Piper stated that the
264 concept of “express advocacy” has its genesis in the United States Supreme Court case
265 *Buckley v. Valeo* (No. 75-436) No. 75-36, 171 U.S.App.D.C. 172, 519 F.2d 821
266 (“hereinafter referred to as “*Buckley*”). The Court held that the government’s power to
267 regulate expenditures “include express words of advocacy of the election or defeat” of a
268 clearly identified candidate. The words include “Vote for...”, “Vote Against...”,
269 “Support...”, “Oppose...” and other like statements. Mr. Piper stated all other
270 expenditures were not within the power to regulate and these expenditures are often
271 referred to as “issue advocacy”. Mr. Piper stated that in 1998 in *Virginia Soc’y for*
272 *Human Life, Inc. v. Caldwell*, 256 Va. 151, 500 S.E.2d 8014 (1998), the Virginia
273 Supreme Court found that “for the purpose of influencing the outcome of the election” as
274 used in former § 24.2-901, may be narrowly construed to limit its application to groups
275 that expressly advocate the election or defeat of a clearly identified candidate. Mr. Piper
276 stated this relates to the *Buckley v. Valeo* case. Mr. Piper stated that in 2005, the General
277 Assembly requested a review of the Act’s provisions be conducted by the State Board of

278 Elections. The review included a recommendation to replace “for the purpose of
279 influencing the outcome of the election” with “expressly advocating the election or defeat
280 of a clearly identified candidate” in order to reflect in the law the decision of the court. In
281 2006, the General Assembly adopted the recommendation and the bill was signed into
282 law. Mr. Piper stated that the definitions of “contribution” and “expenditure” require that
283 the money be provided or expended in order to “expressly advocate the election or defeat
284 of a clearly identified candidate”. A disclosure statement on a television ad as required by
285 § 24.2-957.1 or to file an independent expenditure report as required in § 24.2-945.2 are
286 dependent on whether the expenditure and/or contribution meet the express advocacy
287 standard as stated in *Buckley* and *Caldwell*. Mr. Piper stated that he viewed the
288 advertisement online and it does not contain the required statement. Chairman Judd asked
289 if the “Paid for the Democratic Party of Virginia” qualifies to meet the disclosure
290 statement. Mr. Piper replied “Yes”. Chairman Judd stated that the ad shall include a
291 disclosure statement, spoken by the chief executive officer or treasurer of the political
292 committee, containing at least the following words: “The [Name of political committee]
293 sponsored this ad”. Mr. Piper replied: “That is correct.” Chairman Judd asked if this
294 satisfies the second item. Mr. Piper replied: “No, the written statement would not satisfy
295 the spoken statement and in reviewing the full screen picture the DPV opens the ad and
296 there is a statement that the DPV sponsored this ad”. Chairman asked if one and two have
297 been satisfied. Mr. Piper replies: “Yes”.

298 Chairman Judd asked Dave Webster to come to the podium. Mr. Webster stated
299 that he was the complainant and that he was from Northern Virginia. Mr. Webster stated
300 that the issue of express advocacy was unfamiliar to him and it is clear that they are
301 advocating the defeat of Ken Cuccinelli. Mr. Webster stated that the McAuliffe
302 Committee has transferred in July, 2013 2.6 million dollars to the DPV and then they run
303 the television ads with the disclosure only paid for by the DPV and then they donate the
304 ad back to the McAuliffe campaign as an in-kind donation. Mr. Webster stated that he did
305 not know what was going on behind the scenes. Mr. Webster stated: “I do not believe that
306 the DPV had enough money to run the statewide ads as at the end of June, 2013 they had
307 \$290,000 dollars before the cash infusion of 2.6 million dollars and I think it is pretty
308 clear where the money coming from and in closing I will just say that I believe this is an

309 expressed advocacy ad and I was surprised to hear that analysis.” Chairman Judd asked if
310 there were any other comments and there were none.

311 Chairman Judd asked if the reports reflect what Mr. Webster stated about the
312 2.6 million dollars given to the DPV Committee. Mr. Piper stated that he did review the
313 report and there was a contribution received but did not recall the exact amount and this
314 did occur around the same time period. Chairman Judd asked if the report by the
315 campaign, would show the in-kind contribution at this point. Mr. Piper replied: “In my
316 review I did not see any contribution by the McAuliffe Campaign and the next report due
317 for that time period would not be due until September 15, 2013.” Chairman Judd stated
318 that he was not sure why we had to go through all of this and he could understand some
319 of the creative names that appear on the ads, stating that they are the ones that paid for
320 the ad and you can’t really find out who is behind the ad but, in this case it is pretty clear
321 who is behind it. Chairman Judd stated that the spirit of the law should be followed that
322 says paid for and authorized by. Chairman Judd asked if there were other comments from
323 the Board Members. Vice Chair Bowers stated that she was not clear that the code that is
324 being referenced is actually the code. Vice Chair Bowers stated that she was not in a
325 comfortable position to make a statement as the only information she has is what has
326 been stated in the letter from Mr. Webster and is inclined to take the staff
327 recommendations. Mr. Lief, Senior Assistant Attorney General and SBE Counsel, stated
328 that there has been debate in the Federal Election Commission about express advocacy
329 and didn’t believe that it is directly applicable to our law but there is some debate about
330 the exact definition and he would conduct more research at the Boards request. Secretary
331 Palmer stated that the Supreme Court has weighed in on this and they have sided more to
332 free speech verses the regulatory scheme and the issue of transferring dollars into
333 different accounts is outside or does not meet the parameter of our regulatory scheme.
334 The SBE staff has reviewed this issue and this is legal under our regulatory scheme and
335 with the review of express advocacy, I believe that the recommendations of the staff
336 should be upheld. Chairman Judd stated the he would like to take legal counsel on his
337 offer to conduct more research. Chairman Judd moved *to table this item so that counsel*
338 *could have time to get back to the Board with the results of his research.* Secretary
339 Palmer requested additional discussion. Secretary Palmer stated that his concern about

340 tabling this agenda item is that it will linger and that the staff recommendation is to have
341 the McAuliffe campaign file an incomplete report so that we get a clear picture and to
342 report the name of the person authorizing, as that is still a part of the recommendation.
343 Mr. Piper stated the separate issue is having reviewed the reports Mr. Webster complaint
344 is valid as there are no names listed in the person authorizing the expenditures for any of
345 the reports I reviewed. The reports of the McAuliffe campaign would need to be amended
346 to include the name of the person authorizing the expenditures. This issue is separate to
347 the issue that has been debated with the express advocacy and whether or not this
348 advertisement in question would fall into a regulated speech. Mr. Piper stated that you
349 could table the discussion on the Stand By your Ad portion and the Board could take up
350 the second issue. Mr. Lief stated that he has completed some research during the Boards'
351 discussion and it appears there was a June, 2013 codification in the federal court that
352 released a decision that is under review by the FEC. Mr. Lief clarified that he was not
353 speaking against the staff recommendations just offering the opinion that was asked for
354 by the Chairman. Secretary Palmer asked what the applicability of the federal scheme to
355 a state gubernatorial race. Mr. Lief stated that these issues are governed by state law and
356 the issue of expressed advocacy came from the Supreme Court ruling on the federal level.

357 Chairman Judd stated that the staff recommendation is that SBE dismisses the
358 complaints and the Board should direct the Secretary to notify the McAuliffe for
359 Governor campaign committee to amend all previously filed reports to include the
360 required by § 24.2-947.4. Chairman Judd asked if we do this for other campaigns, we did
361 not do this for other campaigns. Mr. Piper asked if the amendment was being addressed.
362 Chairman Judd replied: "No, I am addressing the recommendation." Mr. Piper stated that
363 the staff recommendation is that neither the McAuliffe campaign nor the DPV were in
364 violation of the Stand By your Ad or any other applicable laws of the ad. The only item
365 SBE found was that the McAuliffe campaign reports were missing the person
366 authorization the expenditure and those would need to be amended as that information is
367 required by the *Code of Virginia*. Chairman Judd stated that the Board has issued
368 penalties to E.W. Jackson: "Did we do the same thing to E.W. Jackson?" Mr. Piper
369 stated that the penalty that was assessed to the E.W. Jackson campaign was for a late
370 filing of a large pre-election contribution report. Chairman Judd stated that the reason the

371 Board was discussing the McAuliffe incident was because a complaint was filed? Mr.
372 Piper replied: "That is correct."

373 Chairman Judd asked Mr. Lief if he needed more time to research this issue.
374 Chairman Judd stated that this is the reason he made the motion to table this item. Mr.
375 Lief replied that he had explained the federal law and if that was the purpose of tabling
376 this item he did not need more time. Chairman Judd asked Mr. Lief if he concurred with
377 the staff recommendation. Mr. Lief replied that the statute clearly states that express
378 advocacy is part of Virginia law and therefore it is the Board's decision to decide what
379 express advocacy is in this instance. Secretary Palmer asked Mr. Piper to read the
380 language of the ad. Mr. Piper stated that he did not retype the ad however, the link was
381 provided to the Board Members and Deputy Riemer has the ad on his computer if the
382 Board wishes to view the ad in its' entirety. Chairman Judd stated that this is an unusual
383 situation and that he feels that the Board has a recommendation that is not consistent with
384 similar issues that have been brought to the Board. Chairman Judd stated: "The big
385 question for me, on the record, is and in all caps is "WHY", why would you not put the
386 proper disclosure, why do you feel the need to put millions of dollars into a campaign to
387 somehow do it differently and I am puzzled over that and I just don't understand why
388 they would do that. When we start talking about disclosure and independent expenditure
389 verses an in-kind donation that applies as well." Chairman Judd stated that we are asked
390 to make a decision on information that we do not really have. Secretary Palmer stated that
391 currently the motion is to table both of the actions. SBE can separate the two elements or
392 we can just table the Stand By Your Ad consideration so that SBE can conduct additional
393 research on express advocacy. Chairman Judd moved that the *Board table the Stand By*
394 *Your Ad consideration*. Secretary Palmer seconded the motion and the Board
395 unanimously carried the motion.

396 Chairman Judd stated that the Board will deal with the reporting portion of the
397 complaint concerning the Citizen Webster Complaint Against DPV & McAuliffe for
398 Governor. Mr. Piper stated that the review of the reports filed by the McAuliffe for
399 Governor Campaign shows that there is no disclosure of the person authorizing the
400 expenditures required by § 24.2-947.4. Staff recommends that the Board should direct the
401 Secretary, pursuant to § 24.2-953.3, to notify the McAuliffe for Governor campaign

402 committee to amend all previously filed reports to include the information required by §
403 24.2-947.4. Chairman Judd asked if any filing deadlines had been missed by the
404 campaign. Mr. Piper stated that the *Code of Virginia* states that SBE staff has 21 days to
405 notify the committee of a need to amend but, under the Attorney General guidance SBE
406 can initiate this action after that prescribed time period. Mr. Piper stated the reason this
407 was brought before the Board is because it is a part of the complaint and normally this
408 would be handled at the staff level. Secretary Palmer moved that the *Board direct the*
409 *Secretary, pursuant to § 24.2-953.3, to notify the McAuliffe for Governor campaign*
410 *committee to amend all previously filed reports to include the information required by §*
411 *24.2-947.4.* Chairman Judd seconded the motion and asked if there were additional
412 comments. Vice Chair Bowers stated that she was not sure it was necessary to amend the
413 report because the first item builds upon the need to actually amend the report and
414 because we are tabling this issue. Vice Chair Bowers stated that if SBE had defined what
415 creates express advocacy and when it is met in the actual campaign then is it necessary
416 for that campaign to have their report amended. Vice Chair Bowes stated that she would
417 be abstaining from voting on this motion for those reasons. Chairman Judd asked if there
418 were any other comments and there were none. The Board passed the motion: two
419 ‘Yea’s’, zero ‘Nay’s’, and one ‘abstention’.

420 The next order business was the Public Participation Guidelines (Chapter 10)
421 presented by Susan Lee, Election Uniformity Manager. Ms. Lee stated 1 VAC §§ 20-10-
422 130 requires Board review after each presidential election. The Public Participation
423 Guidelines were adopted in 2010, making the 2012 presidential election the first election
424 triggering this review. On May 15, 2013, the Board announced a periodic review of all
425 regulations and that the regulations were posted to Regulatory Town Hall for comments
426 on June 3, 2013. The comment period closed on June 24, 2013, and no comments were
427 received in the Regulatory Town Hall online forum for Chapter 10. At the Board Meeting
428 on June 25, 2013, members of the Board commented that staff needed to find a more
429 efficient way to propose regulations without the delay required to receive comments
430 utilizing Regulatory Town Hall. Ms. Lee stated that SBE has prepared a proposed
431 regulation to allow greater flexibility in seeking public comment through the agency
432 website as well as Regulatory Town Hall, at the discretion of the Board. SBE staff

433 proposes continuing in Regulatory Town Hall the process initiated with the periodic
434 review in May. A comment period for 14 days will open on September 9, 2013
435 publication in the Virginia Register of Regulation, and close on Monday October 7, 2013,
436 allowing consideration of a final regulation at the next Board Meeting. After this
437 regulation is approved and incorporated into the Virginia Administrative Code (VAC) the
438 Board may exercise its' discretion for reviewing comments on Regulatory Town Hall and
439 or on the SBE website. Ms. Lee asked if there were any questions. Chairman Judd asked
440 if we are using the SBE website along with Regulatory Town Hall or in place of
441 Regulatory Town Hall. Ms. Lee stated that after the regulation is approved and
442 incorporated in the Virginia Administrative Code that would solely be the discretion of
443 the Board. Ms. Lee stated that in order to provide full disclosure for the Board SBE is
444 working with the SBE IS Division to allow for public comment on SBE website.
445 Chairman Judd asked if there was an implementing date for this change. Ms. Lee stated
446 that the Board would review this at the October 2013, Board Meeting. Chairman Judd
447 asked if there were additional comments. Deputy Riemer stated that in order to change
448 the process the Board has to go through the process, of changing the process, to change it
449 to a more streamlined version. This new process if the Board agreed could include
450 Regulatory Town Hall. Deputy Riemer stated that this will be helpful because during
451 that process SBE staff can properly work out something that can be set up on the website
452 that is not going to be thrown together quickly. Chairman Judd asked if there were any
453 public comments and there were none. Vice Chair Bowers moved that the *Board seek*
454 *public comment, for a period of 14 calendar days, on the proposed amendments to its*
455 *regulations in Chapter 10, Public Participation Guidelines, to implement a*
456 *recommendation received during the periodic review process.* Secretary Palmer seconded
457 the motion and Chairman Judd asked if there were any other comments and there were
458 none. The Board unanimously carried the motion.

459 The next order of business was the General Administration Guidelines (Chapter
460 20) presented by Martha Brissette, SBE Policy Analyst. Ms. Brissette stated that SBE is
461 proposing one change based on the comments received through Regulatory Town Hall.
462 Ms. Brissette stated that the comment period for Chapter 20 closed on June 24, 2013. One
463 commenter provided four comments detailed in a table provided to Board Members in

464 their Board materials. Staff recommends updating the reference to the HAVA Plan and
465 otherwise retaining the regulations in this chapter without further change. Ms. Brissette
466 stated that SBE is requesting that the Board approved the regulations, 1 VAC 20 Chapter
467 20, (20-20-20-10 through 20-20-80) with the exception of the HAVA plan reference. Ms.
468 Brissette inquired if there were any questions. Secretary Palmer asked if a regular
469 complaint received by SBE is automatically treated as a HAVA complaint. Ms. Brissette
470 stated that everything is presumably a HAVA complaint but, it has to involve certain
471 topics in order to go into that framework. Chairman Judd asked what the difference is
472 between a HAVA complaint and a complaint that is not a HAVA complaint. Ms.
473 Brissette stated that certain subject matters and that the complaint has to be notarized.
474 Ms. Brissette stated that letters arrive at SBE that are Election Day complaints and if they
475 qualify SBE handles them according to HAVA guidelines and if not the letter still
476 receives complete consideration. Chairman Judd asked why there is a difference in the
477 handling. Ms. Brissette stated many complaints really they don't qualify due to lack of
478 notarization. HAVA complaints require a response from the Deputy Secretary of SBE.
479 Secretary Palmer stated that he was concerned that administrative tasking will increase if
480 we treat a complaint as a HAVA complaint that is not a HAVA complaint and SBE could
481 clear up the regulation to correct treating of non HAVA complaints as HAVA
482 complaints. Ms. Brissette stated that the guidance provided on the SBE website is
483 available to citizens who want to file HAVA complaints. Secretary Palmer stated that
484 SBE should look at new language that will streamline this process and if SBE staff does
485 not have a recommendation the regulation should remain unchanged. Deputy Riemer
486 stated that following the election SBE receives complaints that are on the HAVA form
487 and half of them are notarized and half of them are not. SBE then has to determine if the
488 complaint is covered by HAVA therefore it is productive to treat them all as a HAVA
489 complaints. The policy makes it difficult to determine what falls under HAVA and what
490 does not fall under HAVA. Vice Chair Bowers moved that the *Board approve the staff*
491 *recommendation to update the HAVA plan reference and otherwise retain the regulations*
492 *in Chapter 20.* Secretary Palmer seconded the motion and Chairman Judd asked if there
493 were any comments and there were none. The Board unanimously carried the motion.

494 The next order of business was the Campaign Finance Guidelines (Chapter 90)
495 presented by Martha Brissette, SBE Policy Analyst. Ms. Brissette stated that SBE staff
496 does not recommend changes to this chapter. Ms. Brissette stated that this filing fee
497 regulation should not be exempt from the full rigors of the Virginia Administrative
498 Process Act. Most SBE regulations are exempt from the extensive requirements of the
499 Administrative Process Act (APA) under the *Code of Virginia* § 2.2-4002(B)(8).
500 Chairman Judd asked if the only comment received was about the “indigent” language
501 were by a person would not be able to afford to pay \$25.00 fees for filling their reports on
502 paper verses electronically. Ms. Brissette replied that statement was correct. Staff
503 recommendations are that it would not be necessary to amend the regulation to consider
504 this chapter in review. Secretary Palmer stated to clarify the matter before the Board the
505 Governor is asking SBE to review all the regulations systematically so that we could
506 identify any issues or concerns. This process will continue over the next couple of
507 meetings. Vice Chair Bowers moved that the *Board approve the staff recommendation to*
508 *retain the regulation in Chapter 90 without change.* Secretary Palmer seconded the
509 motion and Chairman Judd asked if there were any comments and there were none. The
510 Board unanimously carried the motion.

511 The next order of business was the Hart Voting System Certification presented by
512 Gary Fox, Voter Technology Coordinator. Mr. Fox stated that Hart Voting Systems
513 approached SBE with the 6.2.1 Voting System that currently running on a Windows 2000
514 platform and Hart has asked SBE to update that platform to a Windows 7 Operating
515 System since Microsoft has announced that they are no longer providing support for
516 Windows 2000 OS. Mr. Fox stated that a review by SLI Global Solution is included in
517 the Board materials. SLI issued their test report certifying the system on May 20, 2013.
518 SLI is one of the two labs that are certified by the EAC to test voting equipment. SBE
519 contacted the independent examiner and it was determined that it did not modify the
520 voting system, it only needed administrative review and SBE is asking for approval.
521 Chairman Judd stated that the Board is being asked to move to Windows 7 Operating
522 System. Mr. Fox replied: “Yes”. Chairman Judd asked if there were any questions.
523 Secretary Palmer asked if Mr. Cobb tested the system and if there were irregularities
524 found during testing. Mr. Fox replied: “No irregularities were found”. Chairman Judd

525 moved that the *Board certify the Hart 6.2.1 Voting System, changing the application from*
526 *Windows 2000 to the Windows 7 Operating System platform for use in elections in the*
527 *Commonwealth of Virginia, pursuant to the State Certification of Voting Systems:*
528 *Requirements and Procedures.* Vice Chair seconded the motion and Chairman Judd
529 asked if there were any comments and there were none. The Board unanimously carried
530 the motion.

531 The next order of business was the Digital Scan Trial in Albemarle County
532 presented by Gary Fox, Voter Technology Coordinator. Mr. Fox stated that Albemarle
533 County has requested under the *Code of Virginia, § 24.2-630* that they use an
534 experimental trial of certified voting equipment in three precincts during the November 5,
535 2013 general election. Albemarle County plans to use the ES&S DS200 optical scan
536 machine in the Georgetown precinct, the Dominion ICP machine in the Branchland
537 precinct and the Unisyn OVI machine in the Ivy precinct. This trial will be used to
538 evaluate the purchase of optical scan equipment for use in Albemarle County. Mr. Fox
539 stated that Albemarle County is requesting approval from SBE to allow for the trial of the
540 different equipment. Mr. Fox asked if there were any questions. Secretary Palmer stated
541 that Albemarle County is seeking permission to use the pre-certified digital optical
542 scanners during the next election so they may have the opportunity to test the different
543 equipment before they make a purchase. The code requires them to ask the Board to
544 utilize these systems in this manner. Chairman Judd asked if there were any comments.
545 Secretary Palmer moved that the *Board approve the experimental use of certified optical*
546 *scan voting equipment in Albemarle County for the November 5, 2013 general election*
547 *pursuant to Code of Virginia § 24.2-630.* Vice Chair seconded the motion and Chairman
548 Judd asked if there were any comments and there were none. The Board unanimously
549 carried the motion.

550 Chairman Judd asked if there was any other business or public comment to come
551 before the Board. Bill Brogen from Richmond, Virginia approached the podium. Mr.
552 Brogen stated that Vice Chair Bowers raised the issue of the Attorney General serving as
553 counsel to the Board and there is an appearance of conflict. Mr. Brogen stated that when
554 Mr. Lief was asked for an opinion my observation was that he felt uncomfortable and he
555 did not give you an opinion or provide a statement. Mr. Lief is an honorable person but, I

556 believe he has been put in a position and I believe there is an actual conflict not just an
557 appearance. Mr. Brogen stated that he hoped the Board would consider this and appoint
558 independent counsel. Mr. Brogen stated that he would like to know if there has been any
559 further consideration of the questions Vice Chair Bowers has posed about the possible
560 conflict. Chairman Judd asked if there were any comments. Secretary Palmer stated that
561 SBE continues to do its' business day by day and SBE does it in a fair and impartial
562 manner regardless of who the candidate is and we have a very good relationship with the
563 Attorney's General Office when we need to request their input on information. The Board
564 has every resource to request the Attorney General to conduct an investigation or to
565 request an independent counsel if we believe there is an issue and SBE disagrees with the
566 assertion, and the code independently gives the authority to the chief law enforcement
567 officer of the state which is the Attorney General. SBE will conduct the daily business in
568 a bi-partisan manner and will continue to work through the Attorney General who is a
569 very honorable person and so is Josh Lief, our counsel. Vice Chair Bowers thanked Mr.
570 Brogen for bringing your message here today and again I want it to be clear that earlier
571 today, I know there was some tension, and I wanted it reflected in the Minutes that I do
572 think we have to be proactive by saying something that is affecting this current Board we
573 know there are cases in past history where the Attorney General has run in the
574 gubernatorial election and as a Board Member it is my job, although not paid, I take this
575 very seriously. I think even an implied conflict regardless of someone's outstanding
576 nature or even the bi-partisanship and the cordiality the Board has had these last couple
577 of years this is the first scenario where the person running for office not only has
578 investigatory powers that have changed since July 1st, that they no longer have to ask
579 SBE Board Members for the investigation but, in day to day operations I had to take a
580 proactive statement and say as a Board Member this is a concern of mine and this is why.
581 We don't know what is going to come given this election is not until November and
582 going back to my original intent was to ask the question and it was not an attack on the
583 individual who sits in this room and represents us as counsel but, more importantly a
584 statement on how this representation going to be adopted as it relates to the pending
585 election in November given the fact that the Attorney General is an gubernatorial
586 candidate. Vice Chair Bowers stated: "I wanted that to be stated and I think the examples

587 that were given speak to other cases and certainly to past workings together as a Board
588 and I want to be clear that this is a proactive question I have and it is something I stand
589 behind and I believe we are on very solid ground.” Chairman Judd stated that Vice Chair
590 Bowers raised two points and (i) is that the Board Members serve unpaid and (ii) that the
591 General Assembly in their action basically empowered the Attorney General to begin
592 investigation without SBE Board Members permission and until then it took a unanimous
593 vote to ask the Attorney General to investigate. Chairman Judd stated that the SBE Board
594 Members still have that authority and I hasten to say that if we should be presented with
595 any concern concerning the gubernatorial election we will carefully consider whether we
596 should ask for independent counsel because we find ourselves in this situation. Chairman
597 Judd thanked Mr. Brogen for his comments. Mr. Brogen stated that he did not want it to
598 sound like he was attacking the integrity of the Attorney General or Mr. Lief rather I am
599 concerned about the perception. Mr. Lief stated: “That I am a career public servant and I
600 am counsel to this Board and I think I have made clear many times to this Board that my
601 duties are to read the laws as is and the constitution as is and to do my best. I am very
602 respectful of the work of staff and I am very careful not to overrule that and I want to be
603 thoughtful about it and on that particular question the federal law is pretty clear on
604 whether it applies to the state law and I can’t answer of the top of my head and I like to
605 think about these things when they involve the gubernatorial race or the last election. As
606 attorneys, we have the duty to avoid a conflict of interest and that means my duty to you
607 as a client is twofold, (i) give you the best advice on what the law is and (ii) report any
608 violation of a conflict of interest. There is no requirement that the Attorney General
609 resigns before running for office or recuse himself on a blanket basis. I am cognitive of
610 the concern and we will look at it on a case by case basis and look at it when it may be
611 appropriate to appoint outside counsel.” Mr. Brogen stated: “I am convinced that the
612 Board has given this serious consideration and I feel good about that.”

613 Chairman Judd asked if there were any other comments and there were none.
614 Chairman Judd moved *to adjourn*. Vice Chair Bowers seconded the motion and the
615 Board approved the motion to adjourn. The meeting was adjourned at approximately
616 12:05p.m.

617 The Board shall reconvene on September 23, 2013 at 10:00a.m. in the General
618 Assembly Building, Room C.

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Secretary

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Chair

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Vice-Chair

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