

State of Wisconsin \ Government Accountability Board

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JUDGE GORDON MYSE
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the December 22, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Emergency Rule Amending ch. GAB §1.28, Wis. Adm. Code

Background:

The attached Emergency Rule Order amends ch. GAB §1.28, Wis. Adm. Code, relating to the definition of the term “political purpose,” by repealing the second sentence of ch. GAB §1.28(3)(b), Wis. Adm. Code. This proposal has been prepared following consultation with the Wisconsin Attorney General’s Office concerning pending lawsuits in which the validity of ch. GAB § 1.28 has been challenged.

The amendment in the attached Emergency Rule Order is to the rule that was published on July 31, 2010 and effective on August 1, 2010, following a lengthy two year period of drafting, internal review and study, public comment, Legislative review, and consideration of U.S. Supreme Court decisions, including the *Citizens United* decision. Following the effective date, three separate lawsuits were filed seeking a declaration that the rule was unconstitutional and beyond the Board’s statutory authority: one in the U.S. District Court for the Western District of Wisconsin, one in the U.S. District Court for the Eastern District of Wisconsin, and one in the Wisconsin Supreme Court. On August 13, 2010, the Wisconsin Supreme Court temporarily enjoined enforcement of the August 1, 2010 rule, pending further order by the Court.

In the lawsuit in the U.S. District Court for the Western District of Wisconsin, the Board, after consulting with its litigation counsel from the Wisconsin Attorney General’s office, previously executed a joint stipulation with the plaintiffs in that case, asking the Court to permanently enjoin application and enforcement of the second sentence of ch. GAB §1.28(3)(b), Wis. Adm. Code. On October 13, 2010, the Court issued an Opinion and Order which, among other things, denied the parties’ request for that permanent injunction and stayed the case pending the outcome of the case in the Wisconsin Supreme Court. In denying the permanent injunction, the Court noted that “G.A.B. has within its own power the ability to refrain from

enforcing, or removing altogether, the offending sentence from a regulation G.A.B. itself created” and emphasized that “removing the language—for example, by G.A.B. issuing an emergency rule—would be far more ‘simple and expeditious’ than asking a federal court to permanently enjoin enforcement of the offending regulation.” *Wisconsin Club for Growth, Inc. v. Myse*, No. 10-CV-427, slip op. at 2 (W.D. Wis. Oct. 13, 2010). The Court further noted that staying the case would give the Board time to resolve some or all of the pending issues through further rulemaking. *Id.*, slip op. at 14.

In addition, the Board, through its litigation counsel, has represented to the Wisconsin Supreme Court that it does not intend to defend the validity of the second sentence of ch. GAB § 1.28(3)(b) and that it would stipulate to the entry of an order by that Court permanently enjoining the application or enforcement of that sentence.

The attached Emergency Rule Order brings ch. GAB § 1.28 into conformity with the above stipulation and with the representations that have been made to the Wisconsin Supreme Court. The proposed emergency rule also comports with the suggestions made in the October 13, 2010, Opinion and Order of the U.S. District Court for the Western District of Wisconsin.

The only change that the proposed emergency rule makes to the August 1, 2010, rule is the repeal of the second sentence of GAB 1.28(3)(b). All other portions of GAB 1.28 would be unchanged. However, all of the revisions to GAB 1.28 that were effected on August 1, 2010, remain temporarily enjoined pending further order of the Wisconsin Supreme Court.

Recommendation:

Staff, following consultation with litigation counsel from the Wisconsin Attorney General’s Office, recommends that the Board adopt the attached Emergency Rule Order amending ch. GAB 1.28, Wis. Adm. Code.

Proposed Motions:

1. **MOTION:** Pursuant to §§5.05(1)(f), 227.11(2)(a) and 227.24, Wis. Stats., the Board approves the attached Notice of Order of the Government Accountability Board (Emergency Rule Order Amending GAB 1.28, Wis. Adm. Code) and directs the staff to publish it.
2. **MOTION:** Pursuant to § 227.24(4), Stats., the staff shall schedule a public hearing to occur within 45 days of the anticipated publication date of the Notice of Order of the Government Accountability Board (Emergency Rule Order Creating GAB 1.28, Wis. Adm. Code).