

May 10, 2024

VIA EMAIL ONLY

Attorney Joseph M. Cardamone III
Corporation Counsel
Kenosha County Corporation Counsel's Office
912 56th Street
Kenosha, WI 53140

**RE: Kenosha County Ethics Complaint Against Andrew Berg
Investigation Findings, Conclusions and Recommendations**

Dear Attorney Cardamone:

You previously contacted me requesting an independent legal opinion related to an ethics complaint that was made against former Kenosha County Board Supervisor Andrew Berg. Please accept this correspondence detailing my investigation, findings, conclusions and recommendations related to the complaint.

Details of the Ethics Complaint

On March 6, 2024, a formal written ethics complaint and request for investigation was received by your office from Kenosha County Board Supervisor Zachary Rodriguez. The complaint alleged that then-County Supervisor Andrew Berg (hereinafter "Mr. Berg") requested and received "hundreds" of county-owned materials and that he used those materials along with official business cards to campaign. The complaint did not allege the date that these materials were allegedly distributed, but the complaint did reference that it occurred during the election season.

Factual Findings

Upon your contacting my office, I engaged in a record review of the complaint and several County emails related to this allegation. From that review, I learned that all candidates for elected office, including Mr. Berg, were provided materials reminding candidates about the requirements and limitations on using taxpayer funded materials during election cycles.

I also reviewed an e-mail string that started on February 6, 2024, with Mr. Berg contacting Clement Abongwa (Kenosha County Highway Director) inquiring "Who is running Parks right now?" and "I meed [sic] to pick up 1,000 park maps." Over the course of the exchange, Mr. Berg was

eventually advised that there were only “600 to spare” and Mr. Berg replied by indicating he wanted all of them. From the email exchange, it appears that the materials were picked up by Mr. Berg on February 12, 2024.

As part of my investigation into the ethics complaint, I also conducted a telephone interview with Mr. Berg on April 23, 2024. Mr. Berg was represented by counsel, Attorney William Sulton, who also attended the interview. During the interview, Mr. Berg confirmed that he requested and obtained “hundreds” of 2023 “Kenosha County Activity Guides” (as Mr. Berg described them, but which also include a County map). I have attached an electronically formatted version of what was eventually distributed by Mr. Berg. Mr. Berg believed that he received approximately 600 of the 2023 Activity Guides to distribute and he also stapled his Kenosha County Board Supervisor business card to the Activity Guides. Mr. Berg acknowledged that the 2023 Activity Guides and the business cards were generated using public funds and constituted Kenosha County property.

Mr. Berg indicated that he distributed all of the materials provided by the County. However, he indicated that when he distributed the materials, he did not ring any doorbells, nor did he target households with registered or likely voters – he simply dropped them at every door within his County Supervisor district. However, Mr. Berg did not deliver the materials to County residents outside of his district.

Mr. Berg indicated that these materials were dropped off over the course of two-or-three days over the course of one week, during February of 2024. When attempting to identify what specific date the materials were distributed, Mr. Berg stated that he maintained a “Re-Elect Andy Berg” Facebook page and he indicated that he took a picture of himself while dropping them at doors and posted that picture:



The above-captured post was made on February 18, 2024. Of note, this post was made on the “Kenosha County Supervisor Andy Berg” Facebook page and also shared on Mr. Berg’s personal page that same day:



Both Mr. Berg’s personal page and his “Kenosha County Supervisor Andy Berg” contain political and/or campaign content. While Mr. Berg indicated during our interview that he posted the picture to his “Re-Elect Andy Berg” Facebook page, I was unable to locate the posting on that particular page, suggesting that either Mr. Berg was mistaken in his statement or the post has been removed.

Mr. Berg indicated that he did not drop off these materials for campaign purposes, but that instead he dropped off these materials as a “constituent service.” I inquired about what constituent service was provided in dropping off these materials and Mr. Berg responded that he was “informing [his constituents] of services and recreation that the County provides.” Mr. Berg went on to indicate that he felt that he was actually “saving the County money” by distributing the maps so that they would not need to be thrown away and that he was “being responsible” for the County maps by making sure that they were distributed to residents.

While these materials include a county map and addresses for the County’s parks (which largely remain the same over the years), the activity guide provides a listing of “2023 Events,” which

detail events and recreation opportunities that already occurred. Further, the business card that was also attached does not appear to support the constituent services rationale offered by Mr. Berg.

Moreover, I did inquire whether Mr. Berg had ever distributed these materials to his constituents previously in an effort to provide this sort of constituent service or to ensure that the maps reach residents; however, Mr. Berg refused to answer that line of questioning upon the advice of legal counsel.

In summary, Mr. Berg has conceded that he obtained and distributed approximately 600 Kenosha County-owned 2023 Kenosha County Activity Guides, along with his official business card, during February of 2024, while he was in the midst of a re-election campaign. These materials were dropped off at residents' doors, similar to what would occur during a campaign lit-drop (albeit not targeted to registered or likely voters). The fact that these materials were being distributed was also promoted by Mr. Berg on multiple social media accounts that also include political posts.

Applicable Laws

It is important to note that I have been retained to conduct a review and offer a legal opinion related to whether Mr. Berg may have violated the Kenosha County Ethics Code (Chapter 19 of Kenosha County Ordinances). While the Kenosha County Ethics Code does incorporate several state statutes, it does not expressly incorporate Wis. Stat. § 11.1205. However, for purposes of evaluating a potential violation of Kenosha County Ethics Code, I do conclude that the statute is relevant for purposes of evaluating whether certain conduct is improper.

Wis. Stat. § 11.1205 provides, in relevant part, that “no person elected to state or local office who becomes a candidate for national, state, or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed” after the first day that nomination papers may be circulated. In adopting this law, the legislative intent was to prevent the use of public funds for what could be viewed as political purposes during the statutory recognized campaign period. *See* 69 Atty. Gen. 259.

In the case of Mr. Berg's election and pursuant to Wis. Stat. § 11.1205, starting on December 1, 2023, Mr. Berg would be prohibited from distributing of 50 or more substantially identical pieces of material paid for by the County. Importantly, Wis. Stat. § 11.1205 provides a blanket prohibition on this conduct, regardless of the purported purpose or motive in distributing the materials. *See* 2018 Wisconsin ETH 03 (“the intent of the sender is irrelevant to the analysis of whether the 50-piece rule is violated by a given communication.”)

As such, the purported “constituent services” rationale for the distribution of these materials is of no consequence to the analysis of whether Mr. Berg's conduct violated Wis. Stat. § 11.1205. From my review, there appears to be probable cause to believe that Mr. Berg violated Wis. Stat. § 11.1205; however, enforcement of that statute is expressly left to the Wisconsin Ethics Commission. *See* Wis. Stat. § 11.1205(1)(d).

With regard to the Kenosha County Ethics Code, I conclude that there are two potentially applicable sections: § 19.04-1(4)(n) and § 19.08-1(4). Ultimately, I conclude that probable cause exists that both of these provisions were violated.

Legal Conclusions

§ 19.04-1(4)(n)

This provision within Kenosha County Code provides in relevant part that “No County Board Supervisor shall misuse or misappropriate any county funds or property...” While “misuse” and “misappropriate” are not defined within the Code, “misuse” is defined by *Black’s Law Dictionary* as follows:

“A good, substance, privilege, or right used improperly, unforeseeably, or not as intended.”

In this incident, it is clear that the approximately 600 Kenosha County 2023 Activity Guides and the business cards constituted 50 or more publicly funded identical materials. It should be noted that the 2023 Activity Guides and the business cards are actually two separate taxpayer funded materials that were combined into one package.

Pursuant to Wis. Stat. § 11.1205, regardless of Mr. Berg’s stated intent, the distribution of the 2023 Activity Guides and/or the business cards (either individually or combined) in February 2024 constituted a “misuse” because the materials were distributed “improperly” pursuant to Wisconsin law.

§ 19.08-1(4)

This provision within Kenosha County Code provides that the “[u]se of County property for campaign purposes is prohibited.”

Again, there can be no dispute that the approximately 600 Kenosha County 2023 Activity Guides and the business cards constituted “County property.” Further, while Mr. Berg claims that he did not use the materials for “campaign purposes” and that instead they were used for “constituent services,” Mr. Berg’s explanation is not supported by the evidence that I have reviewed.

First, the only “constituent service” that Mr. Berg described in my interview of him was explained as “informing [his constituents] of services and recreation that the County provides.” However, this explanation defies logic since the materials being provided described services and recreation that had already occurred. Moreover, there is no evidence that Mr. Berg ever conducted similar “constituent services” previously, outside of an election cycle.

Next, while Mr. Berg’s distribution of these materials was allegedly not targeted to registered voters or likely voters, the materials were distributed solely to residences within Mr. Berg’s district in a manner very similar to a campaign lit-drop, complete with Mr. Berg’s official business card stapled to the cover of the materials.

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Finally, I believe that it is also relevant that Mr. Berg publicized his distribution of these materials on at least two different social media pages. Mr. Berg stated that he posted about this distribution on his “Re-Elect Andy Berg” Facebook page; however, I have been unable to verify whether that is accurate. Nonetheless, it was posted (and continues to be accessible) on the “Kenosha County Supervisor Andy Berg” Facebook page and Mr. Berg’s personal Facebook page. Both of these pages appear to have been used for political commentary and campaigning and the promotion of the distribution of these materials on social media certainly also supports the conclusion that the County-owned materials were used for campaign purposes, contrary to County Code.

Recommendations

In accordance with § 19.11-1 of the Kenosha County Ethics Code, I conclude that there is probable cause that the Ethics Code was violated and, as such, I recommend that the ethics complaint and the details of this investigation be forwarded to the Kenosha County District Attorney’s Office for potential prosecution.

Thank you for contacting me with this important issue. If any further questions arise, please feel free to contact me at your convenience.

Very truly yours,



SAMUEL C. HALL, JR.

Enclosure