



**JACKSON
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Oregon

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To: Danny Jordan, County Administrator
From: Madison Simmons, Senior Assistant County Counsel
Subject: JCFA Demand to Cease and Desist
Date: March 4, 2024

Question:

I have been asked to review the “Demand to Cease and Desist” (Letter) sent by Denise Krause on behalf of Jackson County for All (JCFA) regarding alleged violations of ORS 260.432, ORS 260.532, and OAR 165-013-0030, and to advise on any potential issues facing the County, the Commissioners, or named or unnamed employees of the County as alleged in the Letter. Additionally, you asked if the County should respond to the Letter.

As an additional consideration, while Ms. Krause—ostensibly on behalf of JCFA—has made some vague allegations of violations of the ORS and OAR provisions, another Chief Petitioner for Initiative Petitions Jack 23-01, Jack 23-02, and Jack 23-03 (Petitions), Dr. Dave Gilmour, expressed his appreciation to County Administrator Danny Jordan after his presentation to the BoC. With regard to the information Mr. Jordan provided regarding the potential financial costs of enacting the Petitions, Dr. Gilmour wrote that Mr. Jordan’s “excellent and detailed evaluation of potential costs” was valuable because the “public deserves to know the numbers, so they can be fully informed before the May election. These comments are not determinative as to whether the County, the Commissioners, or named or unnamed County employees violated any of the provisions of Oregon law, as alleged in the Letter. However, it is noteworthy that two individuals, both of whom are involved in the Petitions and JCFA, had two such different reactions.

Short answer:

There are no major issues or potential violations as alleged by the Letter with regard to the County, the Board of Commissioners, or the named or unnamed employees of Jackson County.

Long answer:

In their Letter, JCFA asserts that Jackson County actors, including Commissioners, County Administrator Danny Jordan, County Counsel/Deputy County Administrator Joel Benton, and unnamed “Public Employees” within the County Administration and Counsel Departments are in violation of ORS 260.432, ORS 260.532, and OAR 165-013-0030.

For the reasons stated herein, I believe that these allegations are unfounded. I will address the alleged violations of each provision of ORS and OAR separately.

I. ORS 260.432

ORS 260.432 provides that “a person may not attempt to or actually coerce command or require a public employee to (d) promote or oppose the filing of an initiative; promote or oppose the gathering of signatures on an initiative; or promote or oppose the adoption of a measure. . .” and “a public employee may not engage in any of the following activities while on the job during working hours or while otherwise acting in the public employee’s official capacity: (c)(d)(e)”. Per the same statute—ORS 260.432(7)—the term “public employee” does not include an elected official. Therefore, any statements or discussions by and between Commissioners regarding support or opposition to a measure are not in violation of the law, so long as the Commissioners are only discussing their own opinions and are only strategizing with one another. Elected officials cannot “coerce, command or require a public employee” to promote or oppose a measure in the public employee’s professional capacity.

The legal question, then, is whether the Commissioners’ statements about the JCFA measures and their direction to staff with regard to the measures meet the standard of “coerce, command or require” in this context.

The Oregon Court of Appeals has addressed this issue with regard to a ballot measure in Portland requiring fluoridation of the water supply in 1980. *Burt v. Blumenauer*, 65 Or. App. 399 (1983). In determining whether the Multnomah County Health Department had been “coerced” into promoting pro-fluoridation material, the Court of Appeals evaluated the specific actions of the County Health Department employees, which included publication of communications that “were one-sided” in favor of fluoridation, and an apparent endorsement by the County Human Resources Department of the group Oregonians for Fluoridation on pamphlets that were distributed as campaign materials. *Id.* at 404, fn. 8. The Court of Appeals cited to guidance from other states, finding that “some courts have drawn a distinction between neutral education and advocacy.” *Id.* at 406.

Ultimately, the Court in *Burt* declined to grant summary judgment because there were “genuine issues of material fact. Among those issues are whether defendants, or some of them, required public employees to oppose, or expended public money to oppose, the adoption of the anti-fluoridation ballot measure.” *Id.* at 407. Put differently, the absence of “material facts” that showed that there was a requirement of employees or other expenditure of public moneys to oppose a ballot measure would likely indicate that no violation existed. So, a directive by Commissioners to research only the negative implications of the Petitions, or to otherwise color the advice sought by the County Administrator and staff into an anti-initiative document could potentially be a violation of the law. However, the absence of facts to support any conclusion that such nefarious activism or advocacy was directed by Commissioners or staff would not support a finding of violation.

In the present case, JCFA concludes that “Commissioners Rick Dyer, Colleen Roberts and Dave Dotterer are persons who have each coerced, commanded and/or required public employees to take actions which violate ORS 260.432.” In support of this conclusory statement, JCFA offers “evidence” that they have been “informed and believe” that Mr. Jordan, Mr. Benton and “various public employees

in the County Administration and County Counsel departments, including Facilities Maintenance and Finance, have been coerced, commanded and/or required” to take actions that violate ORS 260.432. The only “facts” that they allege to support these allegations, however, are vague to the point of not being evidence: references to meeting minutes from 3 BoC staff meetings and unspecified “statements made by County Administrator Jordan” to the media.

Other than a vague allusion to Mr. Jordan’s conversation(s), without any specification, with the media, JCFA does not provide any support for its allegations against the Commissioners, County Administrator, County Counsel, or other “various public employees in the County Administration and County Counsel departments” beyond the assertion that grievant and “JCFA are informed and believe” such to be true. The grievant claims that “facts supporting this demand are “evidenced in, but not limited to” the record of three BoC meetings, materials circulated by County Administration, and statements made “to local media and press in January and February of 2024.”

Due to the lack of specificity articulated in the Letter, I was forced to review the entire record of the identified BoC meetings, the materials circulated by County Administration, and—to the extent I was able to identify such—statements made to “local media and press” in January and February of 2024. In my review of these materials, I was unable to find any facts or evidence of the Commissioners “coercing, commanding, and/or requiring” any public employee to take any action to oppose the Petitions, or to expend public money opposing the Petitions. Thus, without JCFA providing any more specific allegations, I conclude that there is no evidence I was able to find that Commissioners, the County, Mr. Jordan, or any other named or unnamed County employees “coerced, commanded and/or required public employees to take actions which violate ORS 260.432.”

Further, the Letter sent by JCFA is not part of the process under ORS for alleged violations of this statute. The remedy for alleged violations of ORS 260.432 is outlined in ORS 260.995. In this process, a grievant must pursue a civil action as outlined in ORS 183.745, which is a contested case hearing initiated by the Secretary of State’s office. Writing and sending a “Demand to Cease and Desist” is not a legal remedy and does not need to be formally recognized, addressed, or responded to.

II. ORS 260.532

JCFA’s second allegation is that “County Administrator Danny Jordan has communicated, written, and caused to be published and circulated false statements of material fact relating to the JCFA measures” in violation of ORS 260.532. The title of 260.532 is “False publication relating to candidate or measure; civil action; damages; other remedies; limitation on action.” ORS 260.532(1) provides that no one “shall cause to be written, printed, published, posted, communicated or circulated, including by electronic or telephonic means, any . . . publication . . . with knowledge or with reckless disregard that the [publication] contains a false statement of material fact relating to any candidate, political committee or measure.”

In support of their claim that Mr. Jordan violated 260.532(1), JCFA claims that the following subjects included in Mr. Jordan’s communications were a false statement of material fact relating to a measure: (1) the 1990 decision in *Hudson v. Feder*; (2) a required \$50,000 in dues to the Association of Oregon Counties is a “cost of implementing the JCFA Measures”; and (3) a \$5,000 retreat will increase to

\$8,335 if the measures are passed. JCFA claims that these examples are “by no means exhaustive” However, JCFA failed to identify any other statement which they believe are false statements of material fact. Each of these statements by Mr. Jordan are addressed in turn.

First, Mr. Jordan conveyed to the Commissioners that the Josephine Circuit Court had reviewed a Declaratory Action by the Josephine County Finance Director in *Hudson v. Feder* with regard to a Josephine County Charter provision limiting the salaries of the Commissioners of Josephine County to a set amount set forth in the Charter. Mr. Jordan did not misconstrue the nature of *Hudson v. Feder*, and although it was reversed without comment by the Court of Appeals, the substance of the Circuit Court’s reasoning is not a “nullity.” Further, in his discussion, Mr. Jordan specifically stated that the holding in *Hudson v. Feder*, though potentially persuasive, was not binding on a Jackson County Court in reviewing the provisions of the Petitions. Finally, while not mentioned during Mr. Jordan’s discussion at the February 15th BoC staff meeting, the conclusion by the Court in *Hudson v. Feder* was subsequently adopted by the Josephine Circuit Court, with regard to the same Josephine Court Charter provision in the subsequent case of *Pumilia v. Hudson*, 94-CV-0111 (1994).

For their second and third points, JCFA alleges that Mr. Jordan’s estimates of \$50,000 in AOC dues and an additional \$5,000 in retreat costs were “false statements of fact.” Although Jackson County is not currently a member of AOC, future commissioners may choose to rejoin the AOC. Based on the County’s previous membership dues to AOC, Mr. Jordan estimated the \$50,000 expense as a potential cost for the upcoming budget. Similarly, he estimated the retreat cost based on previous expenditures. Neither of these were presented as hard-and-fast requirements, but rather as a potential future cost, and neither represented false statements.

For the unspecified allegations, similar to the allegation of violations of ORS 260.432, I was forced to reviewed the entire record of the identified BoC meetings, the materials circulated by County Administration, and, to the extent I was able to identify such, statements made to “local media and press” in January and February of 2024. In my review of these materials, I was unable to find any facts or evidence of false statements of material fact made by Mr. Jordan or any other named or unnamed employee or official of Jackson County. Thus, without JCFA providing any more specific allegations, I conclude that there is no evidence I was able to find that Mr. Jordan or any other named or unnamed County employee or official of Jackson County violated ORS 260.532.

Finally, similar to the allegation in the Letter of a violation of ORS 260.432, ORS 260.532 provides an avenue for redress in subsection (5). Sending a “Demand to Cease and Desist” is not contemplated in the statute as a remedy for an alleged violation. Like their first claim, the Letter is an inappropriate and non-binding mechanism for enforcement of an alleged violation.

III. OAR 165-013-0030 – Restrictions on Political Advocacy by Public Employees

Finally, JCFA alleges that the County has violated the “Restrictions on Political Activities of Public Employees,” which is the handbook incorporated into OAR 165-013-0030. JCFA alleges that “the provisions of ORS 260.432 begin to apply to initiative efforts as soon as prospective petitions are filed.” However, the Letter has not alleged, nor have I been able to ascertain, any facts which would demonstrate a violation of ORS 260.432 or 260.532. JCFA seems to imply in its Letter that any

discussion by public employees of an initiative is prohibited by ORS 260.432. However, only advocacy towards supporting or opposing an initiative is in violation of Oregon law. The Manual provides that it is expressly legal for a public employer to “tell employees about the possible effects of a measure so long as the information presented is impartial and balanced.” “Restrictions on Political Advocacy by Public Employees,” adopted by OAR 165-013-0030, p. 8 (Rev. 07/2023).

IV. Conclusion

In my review, I cannot see any reasonable interpretation wherein the information provided by Mr. Jordan violates provisions of Oregon law or Administrative Rule. The potential enforceability of a Charter amendment setting the salaries of Commissioners for Jackson County and some of the potential estimated costs if the Petitions are enacted- are not “advocacy” towards supporting or opposing the Petitions; rather, Mr. Jordan’s review and report served only to provide information to the Commissioners, County employees, and the public regarding the possible effects of passage of the Petitions introduced by JCFA. Therefore, I conclude that the County, the Commissioners, Mr. Jordan, and any other named or unnamed employees of Jackson County have not violated ORS 260.432, 260.532, or OAR 165-013-0030.