

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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ATTORNEY GENERAL



JAMES T. BOFFETTI
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August 2, 2023

Thomas Day
General Manager
Gunstock Mountain Resort
719 Cherry Valley Rd.
Gilford, NH 03249

Re: **GUNSTOCK AREA COMMISSION ELECTIONEERING
CEASE-AND-DESIST ORDER**

General Manager Day:

You authorized two political contributions totaling \$1,500 from Gunstock Mountain Resort funds. Although this Office concludes that you are not in the class of public employees that is prohibited from electioneering under RSA 659:44-a—and you are therefore entitled to electioneer with certain limitations—when making these political contributions, you utilized public resources in violation of RSA 659:44-a, II. As such, you are ordered to cease-and-desist from electioneering in violation of RSA 659:44-a, II.

We understand that there is confusion regarding the issue of which public officials are allowed to electioneer and what, if any, public resources can be used by them while electioneering. While issuing a cease-and-desist order, we do not find that you had any intent to violate the law and anticipate closing this matter following your submission of an acceptable remediation plan.

I. FACTUAL BACKGROUND

a. Complaint

Gunstock Mountain Resort is owned by Belknap County and is overseen by the Gunstock Area Commission (“GAC”), which is a five-member board appointed by the Belknap County Delegation (“Delegation”).¹ The GAC was created by an enabling statute. See Laws of 1959, Chapter 399 (An Act to Provide for the Operation and Maintenance of the Belknap County Recreational Area).

¹ The Belknap County Delegation is the collection of State Representatives that represent the House districts from Belknap County in the New Hampshire House of Representatives. The GAC commissioners also receive a small stipend for their work on the GAC.

In July 2022, former Representative Michael Sylvia, then the Belknap County Delegation Chairman, issued a statement regarding a \$500 donation from a Gunstock account to the 2020 campaign for Governor Chris Sununu. The campaign donation was identified during a Gunstock audit. The check was signed by you, and Representative Sylvia alleged it constituted an improper use of public funds. This Office investigated.

b. Investigation

Attorney General's Office Investigator Daniel Mederos reviewed the New Hampshire Secretary of State's Campaign Finance System and found two listed donations made to the political committee "Friends of Chris Sununu," PO BOX 957, Exeter, NH, from the GAC. The first donation was on September 18, 2020, for \$500 and the second was made June 2, 2022, for \$1,000.

Investigator Mederos requested, from the GAC's current management and former management, all policies related to spending or financial controls. The responding individuals confirmed that there were no independent policies, procedures, or guidelines governing the financial management of Gunstock besides the Gunstock Enabling Statute (Laws of 1959 Chapter 399). Gunstock management works within an annual budget voted and agreed upon by the GAC, which also votes upon any additional expenditures. There is a line item in the GAC budget for donations without any further written guidance for the use of that line item. While there were no recollections or records regarding any prior political campaign contributions made by the Resort, in the past, Gunstock had made donations to Ski New Hampshire, which is a not-for-profit trade association that promotes snow sports activities in New Hampshire. Ski New Hampshire had in turn made political donations. Based on our investigation, it appears that making political contributions is a common practice at private ski areas.

On October 4, 2022, Investigator Mederos interviewed you. You stated that you were hired as General Manager in January 2020. You confirmed that there were no policies, guidelines, or manuals specifically defining the financial management of the Gunstock Area Commission and the Gunstock Mountain Resort. You stated that the Gunstock Enabling Statute dictates the operations of the Resort, and you relied on the Statute to make operational decisions. You stated you had authorized two political donations to "Friends of Chris Sununu." The first donation was in 2020 for \$500 and a second was made in 2022 for \$1,000. You stated that you had been in the ski resort management business for a long time and, during your management of Waterville Valley, you, as general manager, would donate to the sitting governor regardless of party affiliation. You advised that you made the donations in question from the GAC/Gunstock budget line-item account for donations. While the total budget line-item for donations was approved by the GAC commissioners, they did not specifically approve or deny the campaign contributions.

II. ANALYSIS

This Office must determine (1) whether the Gunstock Enabling Statute or other policies and procedures address the use of Gunstock funds for campaign donations, (2) whether you as General Manager are permitted to electioneer by statute, and (3) whether a payment from

Gunstock accounts to a political campaign constitutes a use of public resources for electioneering purposes.

a. Gunstock Enabling Statute and Governance Documents

The Gunstock Enabling Statute references “gifts, grants, or donations”:

It is hereby declared that the purposes of this chapter are to provide for a commission to operate, maintain, develop, improve and promote the Gunstock Area in Gilford, New Hampshire, owned by the county of Belknap, hereinafter called “area”, for recreational and other purposes in support of recreational activities and to further the public interest thereby. *10 -Powers-* The commission shall have the power to....(m)To solicit, receive, hold, and expend any gifts, grants, or donations from any source made for any purpose set forth in this act.

Gunstock Enabling Statute (Laws of 1959 Chapter 399) 1- Declaration of Purpose.

The Enabling Statute and Gunstock policies contain only high-level direction concerning financial management and the authority to make gifts or donations consistent with the operation of the Resort. There are no rules—let alone rules with specificity—relating to how money is spent. Further, the Enabling Statute does allow gifts and donations to promote and benefit the Resort. On its face, the Statute has ambiguous language that could potentially be read to extend as far as allowing a “gift” or “donation” to a political campaign. Absent reference to any more specific prohibition, such as RSA 659:44-a, the Enabling Statute and governing documents for Gunstock—or lack thereof—do not clearly prohibit a campaign donation. As such, the Enabling Statute is not determinative regarding the propriety or legality of making campaign donations from Gunstock accounts.

b. Electioneering

To constitute an electioneering violation under RSA 659:44-a, I, the following facts must be established: (1) a public employee, (2) who is not exempt under RSA 273-A:1, IX, (3) must electioneer, (4) while in the performance of his or her official duties.

RSA 652:16-h, which was enacted on January 1, 2020, defines “electioneering” as “information that a reasonable person would believe explicitly advocates for or against any candidate, political party, or measure being voted.” RSA 652:16-h. (Emphasis added.) The “express advocacy” contemplated under RSA 652:16-h is not “implicit advocacy,” the regulation of which has been recognized by courts as being unconstitutional. See Buckley v. Valeo, 424 U.S. 1 (1976). See also Stenson v. McLaughlin, 2001 WL 1033614, 3 (D.N.H. Aug. 24, 2001). Additionally, RSA 659:44-a, III states: “‘electioneer’ means to act in any way specifically designed to influence the vote of a voter on any question or office.”

Concerning element (3) listed above, the very nature of an in-cycle campaign contribution is to influence votes for a question or office and is therefore the functional equivalent of express advocacy. Additionally, under element (4) above, you admitted making the

campaign contributions while in the performance of your official duties. Therefore, the campaign contributions you made constitute electioneering and would trigger the prohibition under RSA 659:44-a if the public employee element is also met or if the contributions were utilizing public resources.

c. Public Employee

RSA 659:44-a prohibits “public employees,” as defined under RSA 273-A:1, IX, from engaging in electioneering. RSA 273-A:1, IX identifies specific exceptions of persons who do not constitute “public employees.” Relevant here are the following two exceptions:

- Persons appointed to office by the chief executive or legislative body of the public employer; and
- Persons whose duties imply a confidential relationship to the public employer.

RSA 273-A:1, IX(b) and (c). The New Hampshire Supreme Court holds that:

The term “chief executive” is not defined in RSA chapter 273–A and again, we look to the plain meaning of the term. In Appeal of Westwick, 130 N.H. 618, 621, 546 A.2d 1051 (1988), when deciding whether the plaintiff was the chief executive officer of an administrative agency, we noted that “chief” means “being accorded highest rank, office or rating ... or one who is put above the rest.” Furthermore, we have interpreted this term to include high level positions such as city manager, university president, and mayor.

In re Town of Litchfield, 147 N.H. 415, 418 (N.H. 2002) (Internal citations omitted.) (Emphases added.)

The GAC is equivalent to the chief executive or legislative body of the public employer, Gunstock Mountain Resort. Because you were appointed as the General Manager of Gunstock by the GAC, and had control over the Resort’s operations, you qualify for the exception under RSA 273-A:1, IX(b). In addition, the confidential relationship exception also applies under RSA 273-A:1, IX(c). The factor that determines whether an individual is a confidential employee is whether he/she has access to confidential information including, but not limited to:

1. Labor relations;
2. Negotiations; and/or
3. Significant personnel decisions.

In Appeal of City of Laconia, the New Hampshire Supreme Court held that City’s personnel director’s administrative secretary was a confidential employee under RSA 273-A:1, IX. See Appeal of Town of Moultonborough, 164 N.H. 257, 262 (2012) (“‘Confidential employees’ are those employees who have access to confidential information with respect to labor relations, negotiations, significant personnel decisions and the like.”) (Internal quotations omitted.). The Court noted that a city’s personnel director’s administrative secretary was a “confidential employee” and could not be included in a bargaining unit of other city employees where the administrative secretary was privy to the personnel director’s personal thoughts about

the collective bargaining process. It would be unjust and unreasonable to require the city's personnel director to keep secrets from his secretary about a significant part of his work. Appeal of City of Laconia, 135 N.H. 421 (N.H. 1992).

The General Manager of Gunstock also has access to such information due to his/her administration of subordinate staff. Given the supervisory and administrative responsibilities of the General Manager, the holder of that position necessarily has access to confidential information such as personnel files, employment records, salary information, as well as significant personnel decisions. Additionally, considering that the Court has determined that an administrative secretary qualifies under this exception, the General Manager must have the same, if not a higher, level of confidential relationship with the GAC.

Therefore, as it pertains to the electioneering prohibition, you do not constitute a "public employee," within the meaning of RSA 273-A:1, IX(b), because of your appointment as General Manager, and you are permitted to electioneer.

d. Use of Public Resources

On the issue of whether the campaign donations were made from public funds, it is clear that monies acquired by an operation that is created by statute as a public entity and holds those monies in public accounts would qualify as a public resource. The fact that Gunstock funds are acquired from ticket sales and Resort operations, rather than from taxpayers, does not render the monies "private" and distinct from the public resources covered by RSA 659:44-a, II. Therefore, writing a check from the Belknap County account, from which Gunstock operates, to a political campaign constitutes the use of public resources.

While you are exempt under the public employee definition and do not trigger the electioneering prohibition under RSA 659:44-a, II, the use of a Resort resource—public funds from the operation of a public asset—was improper. Those public funds are a resource closely tied to the non-exhaustive list of government property or equipment described in RSA 659:44-a. Making campaign contributions was a use of Gunstock resources—public resources—to advocate in support of a candidate, which is a violation of RSA 659:44-a, II.

This Office acknowledges the general principle that the government may use public funds to support its own measures. Epping Res. for Principled Gov. v. Epping School Brd. No. 05-E-0094, Pg. 2 (N.H. Super. Ct. June 15, 2005); see also Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005). However, public entities cannot operate in a manner that raises the specter of impropriety or partisanship. Even while you, as General Manager, are exempt from the electioneering prohibition, the campaign contributions you made on behalf of Gunstock used public funds, which is inappropriate electioneering. You must exercise judgment to protect the public asset with which you have been entrusted to manage, and, in doing so, may not use resources in violation of RSA 659:44-a, II.

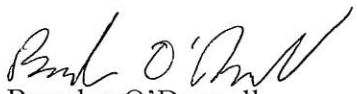
III. CONCLUSION

Pursuant to RSA 659:44-a, II, and based upon the investigation conducted by our Office, you are hereby ordered to **Cease and Desist from using public resources for electioneering**. While issuing a cease-and-desist order, we do not find that you had any intent to violate the law.

You shall submit to this Office a remediation plan outlining the steps Gunstock has already taken or will take to educate current and future personnel on the prohibitions in RSA 659:44-a, appropriate protocols to prohibit electioneering by Resort employees who are subject to RSA 659:44-a in their official capacities, and measures to ensure public resources are not used for electioneering. The remediation plan shall be sent to this Office within 30 days of the date of this letter.

This matter will be closed contingent upon receipt of an acceptable remediation plan. Actions conducted since you became aware of potential electioneering violations may satisfy elements of an appropriate remediation effort. Please contact me if you have any questions.

Sincerely,


Brendan O'Donnell
Assistant Attorney General
Attorney General's Office

cc: Michael Sylvia
Gunstock Area Commission
Chair, Belknap County Delegation
Belknap County Commissioners