



CHEROKEE NATION
OFFICE OF THE ATTORNEY GENERAL

P.O. Box 948
Tahlequah, OK 74465-0948
918-453-5000

Todd Hembree
Attorney General

OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Harvey Chaffin, Attorney for the Cherokee Nation Election Commission, on behalf of the Election Commission

Opinion Number: 2015-CNAG-02

Date Decided: March 12, 2015

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

1. Does the Election Code's general prohibition against "any candidate, financial agent or citizen offer[ing] or provid[ing] something of value intended to influence the vote of a voter of the Cherokee Nation" apply to : (1) Tee shirts, hats, fans, pens, sun shades, Frisbees, bumper stickers and other such campaign advertising materials; (2) Political rallies and hog fries where food and beverage is served to attendees; (3) Parades where candy is thrown to attendees and water is handed out; (4) Door prizes for attending political rallies; (5) Transporting voters to the polls; (6) Retrieving Absentee Ballot Envelopes from voters and delivering them to the Election Commission Office; and (7) Providing music, entertainment and raffles at political rallies.

As we understand the factual basis for your question, LA 04-14 amended Section 44(G) of the Election Code to read, in pertinent part: "[N]or shall any candidate, financial agent or citizen offer or provide something of value intended to influence the vote of a voter of the Cherokee Nation..." Questions have arisen regarding whether certain previously acceptable campaign practices are now in violation of the Election Code.

BACKGROUND

The Cherokee Nation Election Code (the "Election Code"), in its current incarnation, is codified at Title 26 of the Cherokee Nation Code Annotated and was enacted pursuant to Legislative Act

04-14 which was passed by the Tribal Council on February 10, 2014 and subsequently signed into law by the Principal Chief. The Election Code is the controlling law for the conduct of all Cherokee Nation elections for any elective office, Constitutional amendments, initiatives and referenda of the Cherokee Nation. 26 CNCA § 1. Section 44(G) of the Election Code previously read:

No candidate or financial agent shall knowingly accept a campaign contribution or knowingly make or authorize political expenditures which the candidate or financial agent knows to have been made in violation of this Section or Section 43 of this Title.

See LA 46-12, Section 44(G).

Legislative Act 04-14 amended the previous Election Code and Section 44(G) now reads:

No candidate or financial agent shall knowingly accept a campaign contribution or knowingly make or authorize political expenditures which the candidate or financial agent knows to have been made in violation of this Section or Section 43 of this Title; *nor shall any candidate, financial agent or citizen offer or provide something of value intended to influence the vote of a voter of the Cherokee Nation*; and no candidate, financial agent or citizen shall solicit or accept campaign funds or contributions that violates Sections 43 and 44 of this Title.

See LA 04-14, Section 44(G) (emphasis added).

21 CNCA § 426, titled "Unlawful Influence of Voters", provides:

Every person who shall by bribery, treats or offers of employment, attempt to influence any voter in giving his vote, or shall use threats to procure any voter to vote contrary to the inclination of such voter, or to deter him from giving his vote, shall be deemed guilty of a crime, and, upon conviction, be fined in a sum of not less than One Hundred Dollars (\$100.00), and not more than Five Hundred Dollars (\$500.00), or be imprisoned for any time less than one (1) year, and exceeding three (3) months, or both by fine and imprisonment, at the discretion of the Court.

LA 10-90, codified at 21 CNCA § 426.

ANSWER AND ANALYSIS

DEPENDING ON THE FACTS AND CIRCUMSTANCES, THE QUESTIONED ACTIVITY MAY BE PROHIBITED BY THE ELECTION CODE.

In responding to your question, we must examine the Cherokee Nation Criminal Code and the Cherokee Nation Election Code. The Election Commission has the primary jurisdiction to “[i]nvestigate and audit all financial reports and disclosures required” by the Election Code. 26 CNCA § 11(C)(12)(F). Thus, this Office would typically defer to the Election Commission’s

interpretation for those areas of the Election Code. However, when an official opinion is requested of this Office pursuant to the Attorney General Act, LA 12-07, this Office shall opine as to such a question of law and said opinion “shall have the force of law in the Cherokee Nation until a differing opinion or order is entered by a Cherokee Nation court...” LA 12-07, codified at 51 CNC § 104(B)(4).

With respect to interpretation of the Election Code, several principles of statutory construction are relevant to your inquiry. The first being that ascertaining and effectuating legislative intent should be done whenever possible. Next, statutes should be given a reasonable and practical construction that is consistent with the purpose and policy stated in the statute. Finally, because the Election Code section in question may attach criminal penalties to any violation thereof, the statute must be narrowly construed.

The pertinent language of Section 44(G) is new to the Election Code and can be generally looked at as a prohibition on "vote-buying" in the Cherokee Nation. However, this subsection of the Election Code appears to be a restatement of Title 21, Section 426 of the Cherokee Nation Criminal Code, which has long criminalized vote-buying in the Cherokee Nation. Thus, while the prohibition on vote-buying in 44(G) has only recently been added to the Election Code, it is not new to Cherokee Nation jurisprudence.

A careful search of Cherokee Nation case law reveals that this is a question of first impression in the Cherokee Nation. However, there are a number of sister jurisdictions with long standing vote-buying prohibitions to which the Nation may look for guidance; chief among those is the State of Oklahoma, upon which it appears the language in the Cherokee Nation Election Code was modeled.¹ 26 O.S. § 16-106, titled "Bribes to Influence Votes", reads: "Any person who

¹ *U.S. v. Bowling*, 2010 WL 5067698 at FN1. "See Ariz.Rev.Stat. § 16-1006 (making it unlawful to “attempt to influence an elector in casting his vote” by means of “force, threats, menaces, bribery, or any other corrupt means” (emphasis added)); Fla. Stat. § 104.061 (“Whoever by bribery, menace, threat, or other corruption whatsoever ... attempts to influence, deceive, or deter any elector in voting ... commits a felony of the third degree.” (emphasis added)); Idaho Code Ann. § 18-2305 (criminalizing “[e]very person who, by force, threats, menaces, bribery, or any corrupt means ... attempts to influence any elector in giving his vote” (emphasis added)); Kan. Stat. Ann. § 25-2409 (titled “Election bribery ” (emphasis added)); Me.Rev.Stat. Ann. tit. 17-A, § 602 (titled “ Bribery in official and political matters” and criminalizing the payment of any benefit “with the intention of influencing the other's action, decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter ” (emphasis added)); Mass. Gen. Laws ch. 56, § 32 (titled “ Bribery and Corruption Forbidden” and stating that “[n]o person shall, directly or indirectly, pay, give or promise to a voter, any gift or reward to influence his vote or to induce him to withhold his vote” (emphasis added)); Minn.Stat. § 211B.13 (titled “ Bribery, Treating, and Solicitation” and criminalizing the payment of money for “a voter to refrain from voting, or to vote in a particular way” (emphasis added)); Mont.Code Ann. § 45-7-101 (titled “ Bribery in official and political matters” and providing that “[a] person commits the offense of bribery ” if he confers upon another “any pecuniary benefit as a consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter ” (emphasis added)); Neb.Rev.Stat. § 32-1536 (titled “ Bribery ” and extending to “[a]ny person who, by bribery, attempts to influence any voter of this state in voting” (emphasis added)); Nev.Rev.Stat. § 293.700 (titled “ Bribery of an elector” and covering “a person who bribes, or offers to bribe ... any elector in giving his or her vote” (emphasis added)); N . H.Rev.Stat. Ann. § 659:40 (titled “ Bribing; Intimidation; Suppression” and applying to a person who “ bribe[s] any person ... to vote for or against any ticket or candidate for office at any election” (emphasis added)); N.J. St. Ann. § 19:34-25 (titled “ Bribery ” and criminalizing the payment “to induce any voter to vote or refrain from registering for any election” (emphasis added)); N.M. Stat. § 1-20-11 (titled “Offering a bribe ” and providing that “[o]ffering a bribe consists of willfully ... paying ... money ... (A) to induce such person, if a voter, to vote or refrain from voting for or against any candidate, proposition, question, or constitutional amendment” (emphasis added)); Ohio Rev.Code Ann. § 3599.02 (titled “ Bribery offenses concerning

offers, solicits or accepts something of value intended to directly or indirectly influence the vote of the person soliciting or accepting same shall be deemed guilty of a felony." Similar to Oklahoma law, Section 45(A) of the Cherokee Nation Election Code criminalizes violations of vote-buying under Section 44(G), as does 21 CNC § 426.

A. What is meant by the phrase "something of value" in the Election Code?

While 26 CNC § 44(G) is in essence a restatement of 21 CNC § 426, Section 44(G) reads: "nor shall any candidate, financial agent or citizen offer or provide something of value intended to influence the vote of a voter of the Cherokee Nation." The phrase "something of value" is not defined in the Election Code, however it is not so vague or unclear as to invalidate the provision on due process grounds. Similar language has been "employed in similar statutes for a century or more" in other jurisdictions. Trushin v. State, 384 So.2d 668, citing Watson v. State, 39 Ohio St. 123 (1883). This Office is unaware of any jurisdiction that has held such language to be void for vagueness and will not be the first to do so. This Office shall give the phrase "something of value" its plain and ordinary meaning: any item, whether tangible or intangible, which is worth anything.² The real question herein lies in determining what type of unlawful intent in offering or providing "something of value" is prohibited by the statute.

B. What is meant by the phrase "intended to influence the vote of a voter of the Cherokee Nation"?

As noted above, Section 44(G) prohibits the offering or providing "something of value intended to influence the vote of a voter of the Cherokee Nation." 26 CNC § 44(G). As discussed above, "something of value" encompasses any item, whether tangible or intangible, which is worth anything. However, to trigger the prohibition in Section 44(G), that item must be offered or provided with the intent to influence the vote of a voter of the Cherokee Nation.

The phrase "intended to influence the vote of a voter" is not further defined in the Election Code. Because the phrase has not acquired a special meaning through statutory definition or previous judicial construction, this Office shall give the language its ordinary meaning. Webster's defines "influence" as "to affect or alter by influence: SWAY" and "to have an effect on the condition or development of: MODIFY." Webster's New Explorer Dictionary and Thesaurus 268 (Merriam-

voters or potential voters" (emphasis added)); 26 Okla. Stat. § 16-106 (titled " Bribes to influence voters" (emphasis added)); 25 Pa. Stat. Ann. § 3539 (titled " Bribery at elections" (emphasis added)); R.I. Gen. Laws § 17-23-5 (titled " Bribery or intimidation of voters" (emphasis added)); S.C.Code Ann. § 7-25-60 (titled "Procuring or offering to procure votes by bribery " (emphasis added)); Tenn.Code Ann. § 2-19-126 (titled " Bribing voters" (emphasis added)); Tex. Penal Code § 36.02 (defining bribery as paying or receiving "any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter " (emphasis added)); Utah Code Ann. § 20A-1-601 (titled " Bribery in elections—paying for votes" (emphasis added)); Vt. Stat. Ann. tit. 17, § 2017 (providing that "[a] person who attempts by bribery, threats or any undue influence to dictate, control or alter the vote of a freeman" is guilty of undue influence (emphasis added)); Va.Code Ann. § 24.2-1007 (titled "Soliciting or accepting bribe to influence or procure vote" (emphasis added)); Wash. Rev.Code § 29.85.060 (titled "Hindering or Bribing Voter" (emphasis added)); Wis. Stat. § 12.11 (titled "Election bribery " (emphasis added)); Wyo. Stat. Ann. § 22-26-109 (titled "Offering bribe " and providing that "[o]ffering [a] bribe consists of ... paying ... (i)[t]o induce a person to vote or refrain from voting for or against a candidate or ballot proposition" (emphasis added))."

² It should be noted that an item's monetary worth is not the sole measure of its value. See 12 Am. Jur. 2d Bribery § 7, citing U.S. v. Moore, 525 F.3d 1033 (11th Cir. 2008).

Webster, Inc., 1999). Influence has also been defined to mean "to move or impel (a person) to some action." See "influence". *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/influence> (accessed: February 27, 2015). Black's Law Dictionary defines influence as "[p]ower exerted over others" and "[t]o affect, modify or act upon by physical, mental or moral power..." *Black's Law Dictionary* 700 (West 2004). Taken at its most literal, this phrase would result in an absurdity and would prohibit virtually all campaigning in Cherokee Nation elections. All campaign items and activities serve the primary purpose of influencing a voter to vote for a particular candidate or ballot measure. Such a literal interpretation of the statute does not fit the purpose and spirit of the Election Code, which anticipates active campaigning for elective office and ballot measures but seeks to preserve the integrity of the electoral process. Further, because the Election Code makes a violation of Section 44(G) potentially a criminal offense, the statute must be narrowly construed. As such, the phrase "intended to influence the vote of a voter" cannot be interpreted in its most literal context.

As noted above, the new language in Section 44(G) is essentially a restatement of 21 CNC § 426 which makes the "Unlawful Influence of Voters" a crime in the Cherokee Nation. This Section makes it a crime to use threats, bribes, treats or offers of employment to influence the vote of any voter; in other words, vote-buying is illegal in Cherokee Nation elections. While not specifically labeled as bribery, it is clear that the intent behind Section 44(G) of the Election Code is to prohibit such vote-buying activity. The extensive list of sister jurisdictions with similar prohibitions set forth in footnote 1 above all treat the subject language similarly: it is a crime to give or promise anything of value to another in exchange for their vote.

Similarly, Section 44(G) serves to prohibit an individual offering or providing any item, whether tangible or intangible, which is worth anything in exchange for another person's vote. Without the offering or providing of "something of value" in exchange for the vote, there can be no violation of Section 44(G). Indeed, it is this *quid pro quo* which is proscribed by both the Criminal Code and the Election Code. As such, while any and all of the items and activities specifically mentioned in the question above could be considered "something of value" under the Election Code, unless those activities or items are offered or provided in exchange for the voter's vote there is no violation of Section 44(G).

In order to provide further clarification on this matter, this Office will provide some examples as guidance. It has been a common practice for many years for candidates and/or their campaign volunteers to provide Cherokee voters rides to the polling places on election day. While the Election Code prohibits a person from paying another person to vote for a particular candidate or ballot measure, no Cherokee statute prohibits a person from transporting a voter to the polls. Arguably, offering or providing a voter with transportation to the polls could constitute offering or giving "something of value" to the recipient, but this would not be an unlawful practice unless the offer of transportation was conditioned upon the recipient voting or refraining from voting for a particular candidate or ballot measure.

Similarly, it has been a long standing Cherokee Nation campaign practice to provide food and drink to attendees at certain campaign functions, e.g. hog fries. As noted above, offering or providing food and drink could be considered "something of value." Again, simply serving food, drink or other refreshments at a political rally promoting a candidate for elective office, to which

the general public is invited, lacks the essential element of vote-buying: that a voter was given refreshments in exchange for a promise of their vote.

Finally, it is common practice in the Cherokee Nation and its sister jurisdictions for candidates to distribute nominal cost items such as bumper stickers, pens, buttons, t-shirts and posters to voters. This is a completely acceptable means of campaign advertising and promotion. However, it should be noted that any such campaign items may not be given by a candidate in exchange for a voter's vote. Whether large or small, the monetary value of the given items is immaterial; any item given or promised in exchange for a voter's vote is prohibited under Cherokee Nation law.

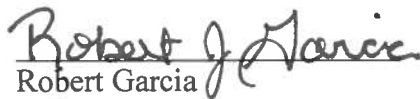
While the aforementioned examples provide some guidance, ultimately, whether a particular campaign practice is unlawful is fact dependent and must be examined on a case by case basis.

CONCLUSION

IT IS, THEREFORE, THE OFFICIAL OPINION OF THE ATTORNEY GENERAL THAT:

- 1. The phrase "something of value" as used in the Election Code means any item, whether tangible or intangible, which is worth anything.**
- 2. The phrase "intended to influence the vote of a voter" as used in the Election Code means something done for the purpose of buying or unlawfully influencing the recipient to vote for a particular candidate or ballot measure or to withhold their vote.**
- 3. Any item, whether tangible or intangible, which is worth anything and is given or offered to any Cherokee Nation voter for the purpose of buying or unlawfully influencing the recipient to vote for a particular candidate or ballot measure or to withhold their vote is a violation of Section 44(G).**

Respectfully Submitted by:



Robert Garcia
Assistant Attorney General



Todd Hembree
Attorney General
Cherokee Nation