BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 96-18

INITIAL DECISION

IN THE MATTER OF THE COMPLAINT FILED BY LEON BAER REGARDING ALLEGED CAMPAIGN REFORM ACT VIOLATIONS BY PEYTON SCHOOL DISTRICT NO. 23-JT,

Respondent.

This is an action brought by Leon Baer ("Baer" or "Complainant")under the Colorado Campaign Reform Act of 1974, Sections 1-45-101 to 1-45-130, C.R.S. (1980 & 1996) against Peyton School District No. 23-Jt ("District" or "Respondent"). On approximately November 21, 1996, Baer filed a complaint with the Secretary of State alleging violations of the Campaign Reform Act by the District. On November 25, 1996, the Complaint was forwarded by the Secretary of State to the Division of Administrative Hearings for appointment of an administrative law judge to hear this matter. Hearing on the merits was conducted in this matter on February 19,1997. Complainant appeared *pro se* at the hearing. Respondent was represented by W. Kelly Dude, Esq. of Anderson, Dude, Pipher & Lebel, P.C. This Initial Decision is issued pursuant to Section 24-4-105(a), C.R.S. (1996).

FINDINGS OF FACT

1. Peyton School District No. 23-Jt is a Colorado school district and a political subdivision of the State of Colorado. It is located in an area east of Colorado Springs, Colorado, and includes one elementary and one secondary school.

2. Complainant Leon Baer is a resident and taxpayer of the District.

3. On September 17, 1996, the District's Board of Education, as the governing body of the District, adopted a resolution referring a ballot question to the voters of the District at the November 5, 1996 general election. The ballot question concerned retention by the District of funds collected by the District in the 1994-95 fiscal year in excess of the limitations established by article X, section 20 of the Colorado Constitution ("Amendment 1"). [1] A copy of the Board's resolution is attached hereto as Appendix A.

4. The specific ballot question adopted by the District's Board of Education and presented to eligible District voters at the November 5, 1996 general election, was as follows:

> SHALL THE PEYTON SCHOOL DISTRICT NO. 23-Jt, COLORADO BE AUTHORIZED TO COLLECT, RETAIN AND EXPEND ALL REVENUES AND OTHER FUNDS COLLECTED DURING THE 1994-95 FISCAL YEAR FROM ANY SOURCE AND USE THEM FOR CAPITAL EXPENDITURES ONLY, NOTWITHSTANDING THE LIMITATIONS OF ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION, PROVIDED, HOWEVER, THAT NO PROPERTY TAX MILL LEVY SHALL BE INCREASED AT ANY TIME NOR SHALL ANY NEW TAX BE IMPOSED WITHOUT THE PRIOR APPROVAL OF THE VOTERS OF PEYTON SCHOOL DISTRICT NO. 23-Jt?

5. In connection with its decision to refer the ballot proposal to District voters, the District issued a public notice concerning the resolution and ballot question. The notice solicited submission of pro and con statements concerning the ballot initiative. On October 3, 1996, Complainant submitted a statement in opposition to the ballot question. These comments were transmitted to the District's Superintendent, Dr. Chad Chase, on or about October 5, 1996. No other comments for or against the ballot question were submitted to the District in response to this solicitation.

6. In his written comments against the proposal, Complainant asserted that the District's initiative was in fact a tax increase. In addition, Complainant argued that the District could have obviated the need for retaining the excess funds by spending funds already available to it in an appropriate manner.

7. In October, 1996, in accordance with the requirements of Amendment 1, the El Paso County Clerk and Recorder mailed to each District household a "Notice of Election to Increase Taxes/To Increase Debt/On a Referred Measure" ("Clerk and Recorder Notice"). This Clerk and Recorder Notice contained the text of the Board's September 17, 1996 resolution and ballot question. In addition, the Notice included a "Summary of written comments against the proposal," which in fact was a verbatim recitation of Complainant's October 3, 1996, statement in opposition to the District's ballot question.

8. During the last week of October, 1996, one week before the general election, a newsletter was sent by the Board to District patrons. Page 5 of the 6 page document was devoted in full to a discussion of the "November Ballot Initiative." The article began with the complete text of the ballot question (but not the verbatim text of the Board's resolution) followed by an explanation of the Board's reasons for

placing the matter on the ballot. This discussion included a short explanation of the requirements of section 20, article X of the Colorado Constitution and a statement indicating that during the 1994-95 fiscal year the District had received excess funds in the amount of $179,159, which must be refunded unless voters voted in favor of the ballot question, thus permitting the District to retain the funds. These matters are essentially the items covered in the Board's resolution. The newsletter article then continued with the following statements:

> Your Board of Education has chosen to ask "you the voters" for the District to retain these monies and utilize them for capital expenditures such as expanding our school facilities and utilize them as described above. We have made the decision based upon the following:
>
> 1. Our school District student population is expanding rapidly, this school year alone we realized an increase of nearly 30% student growth from the previous year. Our Elementary school barely two years old will have to be expanded in the immediate future.
>
> 2. The refunding to voters of Amendment One dollars with all its complications, with the resulting cost might well consume much of the funds available.
>
> In short the school district has a critical need for these funds, which would ***not increase your property tax or any other tax.***

[Emphasis in original]. A copy of this article is attached hereto as Appendix B.

9. Numbered arguments 1 and 2 in the newsletter article concerning the ballot issue, as well as the reference in that article to the District having a "critical need" for the funds in question, are matters not contained in the Board's official resolution to place this matter on the ballot. That resolution was limited to an explanation of the requirements of section 20 article X of the Colorado Constitution; a statement that removing the limitation on fiscal year spending would be in the best interests of the District so that the funds could be used to "provide for the needs of the District;" a representation that state funds would be the primary source of additional revenues available to the District in the event the ballot issue passed; and a statement that no tax increase is associated with the ballot issue.

10. Additionally, numbered arguments 1 and 2 in the newsletter article concerning the ballot issue, as well as the reference in that article to the District having a "critical need" for the funds in question, are not matters contained in the ballot question itself.

11. Because the ballot initiative includes reasons for the Board's decision to propose the ballot issue which are not included in the Board's official resolution or

in the ballot question itself, it goes beyond merely reporting the passage of or distributing a resolution on an issue of official concern.

12. Other items covered in the newsletter included an article on page 1 entitled, "Why this Newsletter?" indicating the Board of Education intended to distribute a twice yearly newsletter informing the public "what is going on in the district;" articles on pages 2,3 and 4 concerning new employees of the District and members of the District's accountability committees; items on page 4 concerning the District purchase of a future school building site and bus route changes; and an article on page 6 concerning student enrollment increases in the District.

13. Each of the articles referred to in paragraph 12 above were included in the newsletter for reasons independent of each other and not for the purpose of bolstering the Board's rationale for presenting the ballot issue to the pubic.

14. The newsletter did not include arguments against the ballot issue despite the fact that Complainant's statement in opposition to the ballot question had been filed with the District on October 3, 1996, at least three weeks prior to the mailing of newsletter.

15. At the time the newsletter was produced and designed, no effort was made to place articles in strategic locations so as to especially emphasize the ballot issue or the Board's position on it.

16. The newsletter was produced by employees of the District under the specific direction and control of the Board. The Superintendent authored the first draft of the article concerning the ballot issue, among other articles. The Board then redrafted and approved the newsletter, including the article concerning the ballot question. The Board specifically approved all of the language contained in the ballot proposal article and it was the intent of the Board that the newsletter contain the ballot initiative article in the form in which it actually appeared.

17. The opinions and positions reflected in the newsletter article on the ballot proposal are the official positions of the Board and the District. The article was not intended to reflect and does not reflect the personal opinions of any individual Board member or District employee.

18. The cost of printing the entire newsletter was $531.37. The cost for printing page 5 of the newsletter was $70.46. Mailing charges for the newsletter were $87.29. The evidence failed to establish that mailing costs would have been any less with the omission of page 5. Typing costs for the ballot issue article were approximately $6.50. No evidence was presented as to the value of the Superintendent's time spent drafting the ballot issue article.

19. Dr. Chad Chase was hired by the Board as Superintendent of the District in the summer of 1996. Chase's duties were to carry out the policies of the Board. At the time of his hire Chase and the Board agreed that the Board would publish a newsletter two or three times a year to inform District residents of the activities of the Board and the District. [2] In furtherance of this agreement, on July 16, 1996, two months prior to the September 17, 1996 Board decision to refer the ballot issue to the voters, Superintendent Chase presented a report to the Board of Education at its regular meeting indicating that there would be a Board newsletter mailed three times a year. The newsletter plan was also discussed at subsequent monthly Board meetings prior to September 17, 1996.

20. The first issue of the Board's newsletter to be published pursuant to the above agreement was the fall 1996 issue (Volume 1, Number 1) containing the ballot question article which is the subject of this proceeding. At the time of the hearing in this matter, Volume 1, Number 1 was still the only issue of the newsletter to have been published by the District. However, a second issue was planned for the spring of 1997 and a third issue was planned to coincide with the end of the 1996-97 school year.

21. The matters communicated by the Board to District residents in Volume 1, Number 1 of the newsletter were all matters which the Board felt to be timely in the fall of 1996 and important to convey to the public. It was not the intent of the Board to use the newsletter as a subterfuge for communicating its opinions concerning the ballot issue.

22. Although the newsletter was new in the fall of 1996, it was the intent of the Board in publishing the newsletter that it was to be an established, customary and routine means of communicating with the public as to actions of the Board and the District of interest to the public.

23. The evidence did not establish that the District received questions, either solicited or unsolicited, concerning the ballot question.

24. The evidence did not establish that any personal funds were used to pay for the newsletter article concerning the District's ballot initiative.

DISCUSSION

I. APPLICABILITY OF SECTION 1-45-116

Complainant alleges that the District violated Section 1-45-116 (1)(a)(I), C.R.S. (1996). This portion of the Campaign Reform Act of 1974 ("the Act") provides as follows:

No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution or contribution in kind in campaigns involving the nomination, retention, or election of any person to any public office, nor shall any such entity expend any public moneys from any source, or make any contributions in kind, to urge electors to vote in favor of or against any:

(A) Statewide ballot issue that has been submitted for the purpose of having a title designated and fixed pursuant to section 1-4-106(1) or that has had a title designated and fixed pursuant to that section;

(B) Local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section;

(C) Referred measure, as defined in section 1-1-104(34.5);

(D) Measure for the recall of any officer that has been certified by the appropriate election official for submission to the electors for their approval or rejection.

It is thus apparent that the Act prohibits public expenditures by political subdivisions with respect to certain ballot propositions. It is undisputed that the District is a political subdivision of the state. *Bagby v. School District No. 1*, 528 P.2d 1299 (Colo. 1974). However, in order to come within the proscriptions of the Act, the ballot question at issue here must fall within one of the types of ballot propositions enumerated in Sections 1-45-116(1)(a)(I)(A)-(D). Complainant, who is *pro se*, does not specify upon which of the above sections he relies. In contrast, the District argues that the Act is inapplicable here because the ballot question at issue does not fall within any of the enumerated categories of Sections 1-45-116(1)(a)(I)(A)-(D). Each of the possible characterizations of this ballot issue is therefore considered below.

Recall Measure [Section 1-45-116(1)(a)(I)(D)]. It is apparent that the District's excess revenues ballot question pursuant to the section 20, article X of the Colorado Constitution is not a measure to recall any officer.

Statewide Ballot Issues [Section 1-45-116(1)(a)(I)(A)]. It is also apparent that the District's excess revenues ballot issue was not a statewide ballot issue. The District's ballot initiative was addressed only to the eligible voters of the District, which encompasses only a small portion of the state. Therefore, Section 1-45-116(1)(a)(I)(A) of the Act, relating to statewide ballot issues, has no applicability to the issues presented in this case.

Local Ballot Issues [Section 1-45-116(1)(a)(I)(B)]. The Act provides that it is applicable to local ballot issues that have been "submitted for the purpose of having a title fixed pursuant to section 31-11-111" or that have had a title fixed pursuant to that section.

The first question to be determined is whether the matter in question is a "local ballot issue." A ballot issue is defined in Section 1-1-104(2.3) as a state or local government matter arising under section 20 of article X of the state constitution, as such matters are defined in sections 1-41-102(4) and 1-41-103(4). Section 1-41-102(4) relates to statewide issues and is therefore not applicable here.

Section 1-41-103(4) relates to local issues and defines "local government matters arising under section 20 of article X of the state constitution" to include approval of revenue changes pursuant to section 20(7) of article X of the state constitution . Section 1-41-103(4)(d). The District's ballot matter in the present case meets this definition: the election requested voters to approve District retention and expenditure of funds in excess of limitations established by article X, section 20, as provided for in section 20(7).

Thus, the District election in this case constituted a local ballot issue. However, not all local ballot issues are governed by the Campaign Reform Act pursuant to Section 1-45-116(1)(a)(I)(B). As noted, this section of the Act only covers those local ballot issues that have been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or have had a title fixed pursuant to that section.

Article 11 of title 31 (including the referenced Section 31-11-111) relates only to municipal initiatives, referenda and referred measures. In particular, Section 31-11-111 relates to setting titles after an election has been ordered pursuant to Sections 31-11-104 and 105, which sections relate to adoption of municipal ordinances in connection with initiatives and referenda, and to the setting of titles by the legislative body of a municipality in connection with any referred measure. In this case, the District's excess revenues ballot issue pursuant to the section 20, article X of the Colorado Constitution does not involve a municipal initiative or referenda. Nor does it involve a measure referred by the legislative body of any municipality. Instead, the ballot issue in question is one referred by the District solely to the eligible electors of the District. Upon passage, such a ballot measure would not become a municipal ordinance and would have no connection with any municipality. Thus, the District's ballot issue is not a local ballot issue that has been submitted for title fixing pursuant to Section 31-11-111, nor has it had a title fixed pursuant to that section. Accordingly, Section 1-45-116(1)(a)(I)(B) has no applicability to the issues presented in this case.

Complainant asserts that the provisions of Section 22-30-104(4) indicate that this election was in fact governed by Section 31-11-111. The Administrative Law Judge disagrees.

Section 22-30-104(4) provides, in pertinent part, that procedures for placing on the ballot a school district-referred measure pursuant to the state constitution shall follow "as nearly as practicable" the procedures for municipal initiatives and referred measures under part 1 of article 11 of title 31, C.R.S., unless procedures are otherwise prescribed by statute or the constitution.

This section, however, is found in Article 30 of Title 22, C.R.S., the School District Organization Act of 1992. By its own terms, Article 30 establishes procedures for the organization or reorganization of public school districts, *see* Section 22-30-102(2), and is clearly limited to that purpose. Within that context, Section 22-30-104 relates to "[a]ll elections authorized in this article." Section 22-30-104(1). Thus, the most reasonable interpretation of Section 22-30-104(4) is that it does not refer to all possible school district-related elections. Instead, Section 22-30-104(4) refers only to elections concerning school district organization or reorganization which are elsewhere described in Article 30 of Title 22 (*see, e.g.,* Sections 22-30-117, 22-30-121.5, 22-30-122 and 22-30-125, relating respectively to elections concerning school district organization; financial matters in new school districts; new school directors in new school districts; and assuming existing bonded indebtedness). The present election is unrelated to organization or reorganization of a school district. Thus, the most reasonable construction of Section 22-30-104(4) indicates that it does not apply to the District's ballot issue in the present case.

Furthermore, even if Section 22-30-104(4) does apply to the election at issue in the instant case, it does not follow that such applicability means that the ballot issue in the present case had its title fixed "pursuant to" Section 31-11-111. Section 22-30-104(4) merely provides Section 31-11-111 procedures shall be followed "as nearly as practicable." Thus, at most, such title setting would have been "pursuant to" the provisions of Section 22-30-104(4) (using Section 31-11-111 as a guideline), rather than pursuant to the provisions of Section 31-11-11. Furthermore, there was no evidence presented in this case as to the precise procedures utilized in setting the title for this referred measure. Nor was there any evidence presented which would indicate whether an effort was made to follow Section 31-11-111 procedures. Under these circumstances the evidence failed to establish that the District's ballot issue was submitted for the purpose of having a title designated and fixed pursuant to Section 31-11-111 or that the ballot issue had a title designated and fixed pursuant to that section.

Thus, no showing has been made that the provisions of Section 1-45-116(1)(a)(I)(B), relating to certain local ballot issues with titles submitted or fixed pursuant to Section 31-11-111, is applicable to this proceeding.

Referred Measure [Section 1-45-116(1)(a)(I)(C)]. The Act further applies to "referred measure[s], as defined in section 1-1-104(34.5)." That section provides:

"Referred measure" includes any ballot question or ballot issue submitted by the general assembly or the governing body of any political subdivision to the eligible electors of the state or political subdivision pursuant to article 40 or 41 of this title.

As noted above, the issue before the electors in the present case is a "ballot issue" as defined in Section 1-1-104(2.3). However, for this ballot issue to come within the coverage of Section 1-45-116(1)(a)(I)(C) as a referred measure, it must have been submitted to the electors of the District "pursuant to article 40 or 41" of title 1.

It is clear that the present ballot issue was not submitted to the electors of the District pursuant to article 40 of title 1 since article 40 applies only to statewide ballot issues. Section 1-40-103(1). The ballot issue in the present case was submitted to electors only within the District and was thus not a statewide issue.

Article 41 of title 1 relates to odd-year elections and other methods of submitting local issues to a vote of the people. Both Sections 1-41-103 and 104 deal with local elections. Section 1-41-103(1) indicates that at local elections held in odd-numbered years, referred local government measures arising under section 20 of article X of the state constitution shall appear on the ballot if they are submitted in accordance with applicable law. Section 1-41-103(2) defines local government for the purposes of Section 1-41-103 to include a school district. Furthermore, Section 1-41-103(4) defines "local government matters arising under section 20 of article X of the state constitution" to include "[a]pproval of revenue changes pursuant to section 20(7) of article X of the state constitution." Section 20(7) of article X of the state constitution in turn provides that "[i]f the revenue from sources not excluded from fiscal year spending exceed [established] limits . . . the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset." The District agrees that the referred measure at issue here sought voter approval to retain excess revenues pursuant to this section of the state constitution.

It is therefore apparent that the ballot issue in question is a local government measure submitted to voters by a political subdivision and arising under section 20 of article X of the state constitution. The question is thus whether this is a referred measure submitted to the voters "pursuant to article 41" in view of the fact that the election in question occurred in an even-numbered year while article 41 refers in general to odd-year elections. The Administrative Law Judge concludes that article 41 of title 1 and the Campaign Reform Act should be construed to cover this election for the following reasons.

1. Article 41 of title 1 is a legislative attempt to clarify ambiguities in Amendment 1. Section 1-41-101, C.R.S. Like Amendment 1 [3/], article 41 does not limit the types of elections that may be held in at times other than in November of odd-numbered years. In fact, the general assembly has specifically noted that

Amendment 1 reflects a public desire to have more opportunity to vote on government fiscal issues and that a construction of Amendment 1 that limits local government electors' opportunities to vote on such issues would be inconsistent with the intent of Amendment 1. Section 1-41-101, C.R.S. Consistent with this legislative interpretation of Amendment 1, Section 1-41-103(5) indicates that:

> The submission of issues at election in November of odd-numbered years in accordance with this section, or at other elections as provided in section 20(3)(a) of article X of the state constitution, shall not be deemed the exclusive method of submitting local issues to a vote of the people, and nothing in this section shall be construed to repeal, diminish, or otherwise affect in any way the authority of local governments to hold issue elections in accordance with other provisions of law.

Thus, article 41 is not intended to be exclusive or to limit local government entities from holding elections in accordance with other provisions of law. Under Section 1-41-103(5), local governments may submit issues covered by Amendment 1 in November of odd-numbered years or as otherwise provided by Amendment 1. Pursuant to Amendment 1, the District's ballot issue election was held in the state general election in 1996. As such, it was one of the elections permitted under article 41 of title 1 and was therefore held "pursuant to" article 41. Because it was submitted "pursuant to" article 41, the District's ballot issue constitutes a "referred measure" as defined in Section 1-45-116(1)(a)(I)(C) and is governed by the Campaign Reform Act.

2. The District asserts that because article 41 is entitled "Odd-year Elections," it does not cover the District's 1996 ballot initiative election and, consequently, Section 1-45-116(1)(a)(I)(C) of the Campaign Reform Act has no applicability here. The Administrative Law Judge disagrees.

Construing the Campaign Reform Act in the manner urged by the District would lead to the absurd result of applying the protections of the Act to elections based solely on when they are scheduled. Further, such a construction would permit governmental units to avoid the requirements of the Act merely by scheduling certain types of elections in even-numbered years. Such a result is untenable and unnecessary as a matter of statutory construction.

A statute must be construed in a manner that gives effect to the legislative purpose underlying its enactment and achieves a just and reasonable result consistent with that purpose. Section 2-4-201 (1) (c), C.R.S. (1980); *Johnson v. Industrial Commission,* 761 P.2d 1140 (Colo. 1988); *State Engineer v. Castle Meadows, Inc.,* 856 P.2d 496 (Colo. 1993). Further, the consequences of a particular construction should be taken into account when construing a statute, and a statute should not be construed in a manner which leads to an absurd result. Section 2-4-203(1) (e), C.R.S. (1980); *Colorado State Board of Medical Examiners v. Saddoris,*

825 P.2d 39 (Colo. 1992). The purpose of the Act is "to promote public confidence in government through a more informed electorate", Section 1-45-102, C.R.S. (1980), and to assure that government does not affect the democratic electoral process by taking sides and bestowing an unfair advantage on one side in an election contest. *Mountain States Legal Foundation v. Denver School District*, 459 F. Supp. 357, 360 (D. Colo. 1978).

There is absolutely no reason to believe the general assembly intended the protections of the Campaign Reform Act to apply to certain types of elections only if they are held in odd-numbered years, but not if they are scheduled for even-numbered years. More specifically, there is no reason to believe the general assembly intended the Act would apply to this particular election if held in 1995, but did not intend the Act to apply to this election simply because it was in fact scheduled to be held in 1996. Thus, a construction of the definition of "referred measure" in Section 1-45-116(1)(a)(I)(C) to include only matters submitted to voters in November of odd-numbered years would be inconsistent with the clear legislative intent of the Campaign Reform Act.

Furthermore, such a construction would also be inconsistent with the provisions of article 41, title 1. As indicated above, this article evinces an intent to broaden, not narrow, local government electors' opportunities to vote on fiscal matters and contains a specific provision acknowledging local government authority to hold issue elections at times other than in November of odd-numbered years. Sections 1-41-101 and 103(5), C.R.S. Thus, despite its title, article 41 covers matters in addition to odd-year elections, including the District's ballot initiative election at issue in this case. Thus, the District's ballot initiative election was, in fact, submitted to the voters pursuant to article 41 and is covered by the Act.

In summary, the District's ballot initiative issue is governed by the Campaign Reform Act as a referred measure pursuant to Section 1-45-116(1)(a)(I)(C). As noted, that section makes the Act applicable to referred measures as defined in Section 1-1-104(34.5). The ballot issue here meets all the requirements of that definition. The election issue is a ballot issue pursuant to Section 1-1-104(2.3) and was submitted by the governing body of a political subdivision (the School Board is the governing body for the District, a political subdivision) pursuant to article 41 of title 1.

II. ALLEGED VIOLATION OF SECTION 116 BY THE DISTRICT

Complainant alleges that the District violated Section 116 of the Act by mailing to electors the newsletter containing an article about the ballot issue which contained only pro-ballot issue information.

Because the excess revenues ballot issue was a referred measure under the Act, the District was prohibited from expending any public moneys or making any contributions in kind to urge electors to vote in favor or against the ballot issue. Section 1-45-116(1)(a)(I)(C), C.R.S. (1996).

In the present case it is clear that the District expended public funds for printing the portion of the newsletter devoted to the ballot question. This expenditure amounted to $70.46. [4] (In addition, there were $6.50 in typing costs which presumably would constitute a contribution in kind as defined in Section 1-45-103(5), C.R.S. [5]). Thus, the issue presented is whether this portion of the newsletter urges electors to vote in favor of the ballot issue as proscribed by Section 1-45-116(1)(a)(I)(C) and, if so, whether any statutory exceptions to that proscription apply here.

Although the District asserts the article is merely a neutral explanation of the ballot issue which does not urge voters to vote one way or the other, the Administrative Law Judge disagrees. Clearly, reprinting the verbatim ballot question and including an explanation of the requirements of Amendment 1 is merely informative in nature and does not constitute urging voters to vote for or against the ballot issue. However, the newsletter does not stop at this point. Instead, it lists reasons why the Board has asked voters to allow the District to retain the moneys "and use them for capital expenditures such as expanding our school facilities." The newsletter then describes the rapid expansion of the District's student population; indicates that the cost of refunding Amendment 1 funds might well consume much of the money involved; notes that the District has a "critical need" for the funds; and emphasizes in underscored, bold-faced and italicized type that voting for the ballot issue would "***not increase your property tax or any other tax***."

As indicated by the letter in opposition to the ballot issue filed with the District by Complainant, certain of these matters are by no means undisputed, either factually or as a matter of policy. (Complainant, for example, asserted in his statement in opposition that this ballot issue effectively constituted a property tax increase and suggested alternative means to deal with the rising school population other than retaining these funds). Nor were these matters presented in a neutral or completely even-handed fashion, either in terms of the choice of language employed or the emphasis supplied. Further, no arguments in opposition to the ballot proposal were included.

The District asserts that the newsletter article does not fall within the proscription of Section 1-45-116(1)(a)(I)(C) because it does not include a specific exhortation to voters to vote in favor of the ballot proposal. This argument is unconvincing.

One underlying purpose of the Act is to assure that government does not provide an unfair advantage to one side over the other in the electoral process by

utilizing public funds to propagandize in support of a particular candidate or issue. *Mountain States Legal Foundation v. Denver School District, supra.* Clearly, it is unnecessary for a communication to specifically state "we urge you to vote for" (or against) a proposal in order to fall within the intended proscription of the Act; it is sufficient that the communication has the effect of urging electors to vote one way or another, without explicitly so stating. Moreover, that is precisely the impact of the District's newsletter article concerning the ballot proposal: it utilizes public funds and has the effect of urging voters to vote in favor of the ballot proposal, in violation of Section 1-45-116(1)(a)(I)(C).

The District asserts that the newsletter article falls within various exceptions to the proscriptions of Act found in Section 1-45-116(1)(a) and (1)(b), C.R.S. (1996). The Administrative Law Judge disagrees with each of these arguments.

Response to Unsolicited Questions from the Public [Section 1-45-116(1)(a)(II)]. An exception to the proscription against the use of public funds to urge electors to vote for or against any measure exists to allow an entity or its employees to respond to questions about the issue, if such questions have not been solicited by the public entity. Section 1-45-116(1)(a)(II). In this case, however, there is no indication that the District received questions, unsolicited or otherwise, concerning the ballot question. Thus, the newsletter cannot fall within this exception.

Expenditures Incidental to Expressing Opinions [Section 1-45-116(1)(a)(II)]. Section 1-45-116(1)(1)(II) permits a member of a public entity covered by the Act to expend up to fifty dollars of public moneys in the form of letters, telephone calls, or other activities incidental to expressing his or her opinion on a ballot issue. The newsletter article at issue here does not fall within this exception to the Act for two reasons. First, the article represents the official position of the Board and the District as a whole, and not the opinion of any individual employee of the District or member of the Board. Thus, the public moneys expended by the District in producing page 5 of the newsletter cannot reasonably be described as an activity incidental to an individual Board member or employee of the District expressing his or her opinion concerning the ballot issue. Furthermore, the amount expended on the newsletter (in excess of $70) exceeds the $50 limit permitted under this section.

In addition, contrary to the suggestion of the District, the statute does not permit the expenditure of $50 *per Board member* in relation to this newsletter article. As noted, the article is the expression of the collective position of the Board as an entity rather than the expression of opinions of individual Board members. The $50 exception in the Act is intended to permit individuals to expend relatively small sums of public funds to express their opinions on matters covered by the Act. It is not intended to permit public entities subject to the Act to subvert the purposes of the Act by pooling the individual exemption to express the agency's official position with

public funds. Such an interpretation would undermine the very purposes of the Act, which is to prevent the government from taking sides and bestowing an unfair advantage on one side in an election contest. *Mountain States Legal Foundation v. Denver School District, supra.*

Factual Summary Exception [1-45-116(1)(b)(I)]. The Act provides that a covered agency such as the District may expend public moneys or make contributions in kind to dispense a factual summary with respect to any ballot issues before voters in the jurisdiction. However, such a summary must include arguments both for and against the proposal and may not contain a conclusion or opinion in favor of or against any particular issue. The newsletter article at issue here does not fall within this exception because it does not include arguments against the proposal (despite the fact that Complainant had filed such arguments with the District well in advance of the mailing of the newsletter) and contained (at least implicitly) a conclusion or opinion in favor of the ballot proposal.

Expression of Personal Opinion by Elected Official [1-45-116(1)(b(II)]. As noted above, the newsletter article constitutes the official position of the Board and the District concerning the ballot proposal. Therefore, it cannot be characterized as the expression of the personal opinion of an elected official.

Expenditure of Personal Funds by Agency Member [Section 1-45-116(1)(b)(III)(c)]. This exception permits members or employees of covered entities to use personal funds to urge voters to vote for or against any issue. There is no evidence that personal funds were used to pay for newsletter article and the District has not urged that this exception is applicable.

Taking a Position of Advocacy on Any Issue [1-45-116(1)(b)(III)(A)]. The Act permits covered entities such as the District to take positions of advocacy on issues covered by the Act, including the current ballot issue. It is clear that the District has taken such a position by passing its resolution and referring the ballot issue to the electorate. Such action is clearly permitted by the Act and Complainant does not assert otherwise. The issue is whether the expenditures of public moneys connected with the newsletter were proper under the Act. Section 1-45-116(1)(b)(III)(A) of the Act does not authorize such expenditures.

Reporting the Passage of or Distributing a Resolution [Section 1-45-116(1)(b)(III)(B)]. The Act permits covered entities such as the District to report the passage of or distribute any resolution which takes a position of advocacy concerning issues covered by the Act, as long as certain conditions are met. Such reporting or distributing must be through established, customary means (other than paid advertising) by which information about other proceedings of the covered agency is regularly provided to the public.

Complainant asserts that this exception is not applicable because the District's newsletter was not an established, customary means of providing information to the public. The Administrative Law Judge disagrees with this argument. The newsletter was conceived and planned prior to the Board's decision to refer the ballot issue for a public vote and was anticipated to be a periodic and routine method of communicating Board and District activities to the public. There is no evidence that the newsletter was used solely as a subterfuge for providing information about the ballot issue or that the newsletter will not continue in the future as a general information publication. Under these circumstances the Administrative Law Judge concludes the newsletter meets the requirement of being an established, customary means of communicating general information about the District's actions to the public.

Nevertheless, the newsletter article in question does not fall within the reporting and distribution exception to the Act found at Section 1-45-116(1)(b)(III)(B). This provision makes an exception for reporting a resolution or distributing such a resolution. However, the article goes beyond merely reporting the passage of the Board's resolution concerning the ballot issue or distributing copies of the resolution and ballot question to the public. Instead, it contains information not found in either the ballot question or the resolution, including the assertion that the District has a "critical need" for the funds in question and the matters contained in numbered arguments l and 2 of the article. This additional information, particularly in light of the style, tenor and timing of the article, is not permitted by the exception in question. *See Stanton v. Mott*, 17 Cal. 3d 206, 103 Cal. Rptr. 697, 551 P.2d 1 (1976) (careful consideration to be given to tenor, style and timing of publication in determining propriety of public expenditures concerning election issues). It places the District in the position of not merely providing a neutral educational service by informing the public of its actions, but taking a position of advocacy on a ballot issue and utilizing public moneys to do so, in violation of the clear purpose and intent of the Act.

The District argues that it did not violate Section 1-45-116(1)(a)(I) of the Act because Board members had no intent to urge the electors to vote in favor of the ballot proposal, but merely intended to produce an informational article concerning the ballot initiative. The Administrative Law Judge rejects this argument and concludes that the subjective intent of the individual members of the Board in redrafting the article in question is not the deciding factor in determining whether the Act was violated.

As a preliminary matter, it is clear that the Board intended to take the action it took: it consciously and deliberately acted to have the newsletter article printed in the precise form in which it was printed. The Board and the District thus took action "to urge" electors to vote in favor of the ballot proposal.

Further, the critical factor in determining whether the Act has been violated under the facts of this case is whether the newsletter article, viewed objectively, had the effect of urging electors to vote in favor of the District's ballot initiative. For the

reasons set forth above, the Administrative Law Judge has concluded that the article did have this proscribed effect. To allow the District to use public funds to produce an article such as this one merely because the District's policy-makers may have been unaware the article had the proscribed effect would clearly undermine the very purpose of the Act, which is to protect the democratic process from inappropriate governmental interference. Further, the fact that a public agency may be ignorant of the objective effect on the public of its communications in no way diminishes the danger sought to be averted by Act. *See Burt v. Blumenauer*, 672 P.2d (Or. App. 1983) (good faith and strength of conviction of government officials is not a defense under Oregon's election law); *Stern v. Kramarsky*, 375 N.Y.S.2d 235 (1975) (even if well-motivated, the actions of state agencies in campaigning for or against elections propositions can only demean the democratic process). Thus, it is unreasonable to construe the Act to permit a public agency (especially where, as here, the public agency is the entity proposing the ballot issue in question), to take actions in ignorance which it could not take were it aware of the true facts.

The Administrative Law Judge therefore concludes that the question of whether or not the Board intended its article to urge electors to vote in favor of the ballot initiative is not determinative of whether the Board's newsletter article violated the Act. The objective effect in this case was that a political subdivision of the state, using public funds to mail information to the voters, failed to maintain a position of neutrality and impartiality with respect to a referred ballot issue and instead took a position of advocacy concerning that matter. Such actions were not covered by the exception to the Campaign Reform Act found at Section 1-45-116(1)(b)(III)(B) and, in fact, violated the Act.

In summary, no exceptions to the Act's proscription against the use of public moneys to urge electors to vote for or against any covered issue are applicable to the District's newsletter article concerning its ballot initiative. Consequently, the District has violated Section 1-45-116(1)(a)(I)(C) of the Act by expending funds to urge voters to vote for the ballot issue.

CONCLUSIONS OF LAW

1. The Secretary of State has jurisdiction over Respondent Peyton School District No. 23-Jt and the subject matter of this proceeding.

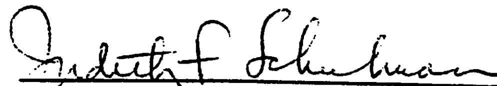
2. Respondent Peyton School District No. 23-Jt violated Section 1-45-116(1)(a)(I)(C), C.R.S. (1996) by expending public moneys in connection with the District's newsletter article concerning the ballot issue to urge electors to vote for that ballot initiative.

INITIAL DECISION

Pursuant to Section 1-35-113(2)(c), C.R.S. (1996), it is the Initial Decision of the Administrative Law Judge that the Secretary of State shall notify the Attorney General of Respondent's violation of Section 1-45-116(1)(a)(I)(C), C.R.S. (1996).

DONE AND SIGNED

June 5, 1997



JUDITH F. SCHULMAN
Administrative Law Judge

FOOTNOTES

1/ Article X, section 20 of the Colorado Constitution is the TABOR Amendment (Taxpayer's Bill of Rights), also known as Amendment 1. Among other things, Amendment 1 imposes limitations on yearly revenue increases by restricting the increase of fiscal year spending to the rate of inflation plus population increase, unless voter approval for an increase in spending is obtained. *Submission of Interrogatories on Senate Bill 93-74,* 852 P.2d 1 (Colo. 1993).

2/ In fact, issuance of a periodic newsletter had been a goal of the Board for some time prior to Dr. Chase being hired and had been a regular practice of Dr. Chase in the past superintendent positions he had held elsewhere in the country.

3/ Article X, section 20(3)(a) provides that: "Ballot issues shall be decided in the state general election, biennial local district election, or on the first Tuesday in November of odd-numbered years."

4/ The evidence did not establish that inclusion of the ballot initiative article resulted in any postage charges beyond the charges incurred by the District for mailing the remaining five pages of the newsletter.

5/ A "contribution in kind" is defined in Section 1-45-103(5) as a gift or loan of any item of real or personal property made to a political committee for the purpose of influencing the passage or defeat of any issue. Personal services are considered to be a contribution in kind by the person paying compensation for the services.

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PUBLIC NOTICE

PEYTON SCHOOL DISTRICT NO. 23-JT

NOVEMBER BALLOT INITIATIVE

RESOLUTION

WHEREAS, the Colorado Constitution limits changes in the Peyton School District No. 23-JT's fiscal year spending from one year to the next to the rate of inflation in the prior calendar year plus the percentage change in student enrollment; and

WHEREAS, this same constitutional provision allows the Peyton School District No. 23-JT to ask voters for authority to collect, retain and expend all revenue it collects in a given fiscal year, notwithstanding this spending limitation; and

WHEREAS, the Board of Education of the Peyton School District No. 23-JT is of the opinion that it is in the best interests of the Peyton School District No. 23-JT to remove the limitation on fiscal year spending so that available sources of revenue may be used to provide for the needs of the District.

WHEREAS, voter approval of the request to collect, retain and expend all revenues received will allow the Peyton School District No. 23-JT to receive the full amount it is entitled to receive under the formula developed to fund schools in the Public School Finance Act of 1994 ("Finance Act"); and

WHEREAS, the primary source of the additional revenues available to the Peyton School District No. 23-JT under the Finance Act if this measure is approved will be state funds, due to the limitation on local property tax in the state constitution; and

WHEREAS, there is no tax increase associated with this request for a revenue change nor will any new taxes be imposed without the approval of the voters,

THEREFORE, BE IT RESOLVED BY THE BOARD OF EDUCATION OF THE PEYTON SCHOOL DISTRICT NO. 23-JT AS FOLLOWS:

1. That on Tuesday, November 5, 1996, the Peyton School District No. 23-JT will submit to the registered electors of this district, the question of whether the District may collect, retain and expend all revenues collected, notwithstanding the spending limitation in the state constitution.
2. That at such election, the title and text of the question appears on the ballot shall be as follows: