

BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

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CASE NO. OS 97-07

INITIAL DECISION

IN THE MATTER OF THE COMPLAINTS FILED BY BONNIE FERGUSON AND NORMA BEARD REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY LINDA MORTON, Mayor of Lakewood, MIKE ROCK, City Manager of Lakewood, TERRY WARE, City of Lakewood Staffer, and KAREN GOLDMAN, City Clerk of Lakewood.

The hearing in this matter was held before Administrative Law Judge Marshall A. Snider on August 28, 1997. Complainants Bonnie Ferguson and Norma Beard appeared *pro se*. The Respondents were represented by Roger W. Noonan, Esq. The Administrative Law Judge issues this Initial Decision pursuant to Section 24-4-105 (14)(a), C.R.S. (1996), and to Section 1-45-111(2)(a), C.R.S. (1997).

PRELIMINARY MATTER

The complaint in this case was initially filed by Complainant Bonnie Ferguson. Subsequently, a similar complaint was filed by Complainant Norma Beard. Beard requested that she be included in the Ferguson complaint. The Administrative Law Judge heard this request at the outset of the hearing and ordered that Beard be permitted to intervene in this matter. Norma Beard has thus been added to the caption in this case as a Complainant.

FINDINGS OF FACT

1. As early as May, 1997, the City Council of the City of Lakewood, Colorado, considered submitting to Lakewood's voters a ballot proposal relating to an urban renewal authority. The proposal under consideration would ask voters to approve or reject the creation of an urban renewal authority.
2. Respondent Linda Morton is the mayor of Lakewood. Morton writes an opinion column in a publication called "Looking at Lakewood". "Looking at Lakewood" is published by the City of Lakewood several times a year, at public expense.
3. In her column in the May, 1997, edition of "Looking at Lakewood", Morton described the benefits of creating an urban renewal authority. This column was entirely

favorable regarding the creation of an urban renewal authority, and contained no negative information. For example, Morton stated that while the city faced a problem involving the decline of Villa Italia, a local shopping center, Lakewood "fortunately" had access to the tool of an urban renewal authority to deal with that problem. The column explained certain advantages of an urban renewal authority, and did not describe any disadvantages.

4. The July and August, 1997, issues of "Looking at Lakewood" also contained articles regarding the potential creation of an urban renewal authority. The July article made a positive presentation of the value of an urban renewal authority. For example, the article described an urban renewal authority as "a powerful tool available to cities in their fight against economic and physical deterioration within designated project areas", and concluded that "[T]he creation of an Urban Renewal Authority in Lakewood could provide the city with a new tool to be used to prevent further deterioration and help stave off a decline in private property values in and around the Villa Italia area". This article did not describe any negative aspects of the creation of an urban renewal authority.

5. The August article in "Looking at Lakewood" primarily provided factual information regarding an urban renewal authority. However, this article included some positive information, such as the need for the city's involvement in the redevelopment of Villa Italia. This article did not present any negative aspects of the creation of an urban renewal authority.

6. The August issue of "Looking at Lakewood" was published prior to August 25, 1997.

7. Prior to August 25, 1997, Respondent Michael Rock, Lakewood's city manager, discussed the proposal for an urban renewal authority at one or more meetings of citizen or civic groups. There was no evidence regarding the content of those discussions.

8. Lakewood prepared, at city expense, a videotape in which Rock and Terry Ware, the manager of Lakewood's Urban Design Division, discussed various issues involved in the creation of an urban renewal authority. This production presented general information regarding urban renewal, and also presented the creation of an urban renewal authority in a positive light. Concerns expressed by citizens regarding creation of an urban renewal authority were discussed only in an attempt to alleviate those concerns. The tape was broadcast on a local access television channel prior to, but not after, August 25, 1997.

9. Some citizens of Lakewood oppose the creation of an urban renewal authority. These citizens have argued that the authority could condemn residential property, that tax dollars would be used to support developers, and that the city would use urban renewal as a tool to change neighborhoods and lifestyles.

10. A group of citizens has banded together to oppose the proposed creation of an urban renewal authority. This group began its activities in June, 1997. Ferguson attended one meeting of this group, but was not a leader of this organization.

11. Ferguson has handed out fliers which oppose the creation of an urban renewal authority. Beard has allowed her name to be used on the flyers as someone supporting the effort opposed to the creation of an urban renewal authority.

12. On August 6, 1997, Lakewood City Clerk Karen Goldman wrote individual letters to Ferguson and Beard, stating that it had come to Goldman's attention that Ferguson and Beard were part of a group of citizens who had come together to oppose an urban renewal ballot question. Goldman's letter advised the Complainants that under the Fair Campaign Practices Act this group constituted an issue committee required to register and file reports.

13. Goldman based her conclusion that the group was an issue committee on her understanding that this group had made expenditures to print a flyer and had raised money through the sale of T-shirts.

14. Sandy Kunzer, whose name was also on the anti-urban renewal flier, did not receive a similar letter from Goldman.

15. At a Lakewood City Council meeting on July 14, 1997, a councilman moved to put the issue of the creation of an urban renewal authority on the November, 1997, election ballot. No specific ballot language was yet in existence, however, and this motion failed.

16. On August 25, 1997, the Lakewood City Council passed a resolution placing the issue of whether Lakewood should create an urban renewal authority on the November 4, 1997, election ballot. The resolution established the following language for a ballot question to be submitted to the electorate:

Shall the City of Lakewood create an urban renewal authority as provided in the Colorado urban renewal law? Yes ___ No ___.

17. In addition to the above language, the August 25 city council resolution proposed a second question, in similar yes/no format, related to the choice of governing bodies for an urban renewal authority, if such an authority were created.

18. The resolution did not fix a ballot title for these questions. However, the resolution directed the city clerk to take all necessary actions regarding the holding of an election on these questions.

19. The City of Lakewood has made no expenditures of funds regarding discussion of the urban renewal ballot issue subsequent to August 25, 1997.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Complainants argue that Goldman's letters of August 6, 1997, violated the Fair Campaign Practices Act, Section 1-45-101, *et seq.*, C.R.S. (1997) ("the Act") because the letters were intended to harass and single out the Complainants. Regardless of Goldman's motivation, the mailing of this letter does not violate the Act. The Complainants cite no provision of the Act which prohibits a government official from advising citizens of reporting requirements. Even if Goldman was incorrect that this group was required to file a statement of organization as an issue committee prior to August 25, 1997 (an issue the Administrative Law Judge does not decide), nothing in the Act prohibits her from sending such a letter.¹

2. The Complainants assert that the Respondents have violated Sections 117(1)(a)(I) and 117(1)(b)(I) of the Act. Section 117(1)(a)(I) provides, in relevant part, as follows:

No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall . . . expend any public moneys from any source, or make any contributions, to urge electors to vote in favor of or against any:

- (A) State-wide ballot issue . . .;
- (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

Section 117(1)(b)(I) provides as follows:

Nothing in this subsection (1) shall be construed as prohibiting an agency, department, board, division, bureau, commission, or council of the state, or any political subdivision thereof from expending public moneys or making contributions to dispense a factual summary, which shall include arguments both for and against the proposal, on any issue of official concern before the electorate in the jurisdiction. Such summary shall not contain a conclusion or opinion in favor of or against any particular issue. As used herein, an issue of official concern shall be limited to issues that will appear on an election ballot in the jurisdiction.

The complaints in this case are directed at Morton, Rock, Ware and Goldman, all of whom are individuals associated with Lakewood city government. However, the above quoted sections of the Act contain prohibitions only against the conduct of public bodies (such as boards, commissions or councils of the state or its political subdivisions). These sections do not contain any prohibitions against individual conduct. The Respondents thus argue that the Secretary of State has no jurisdiction over their individual conduct.

The individual respondents can not be held liable for a violation of the statutes under which this complaint was brought. Those sections of the Act only prohibit certain conduct by public entities, not the conduct of individuals.

The City of Lakewood is subject to the relevant prohibitions of the Act. The city can act only through its agents. Therefore, this complaint could be considered to be in essence a complaint against the City of Lakewood. Citizens seeking to bring possible violations of the Act to the attention of the appropriate public official (in this case the Secretary of State) should not be required to file their complaints in a fashion consistent with the technicalities of legal pleadings. Nevertheless, the hearing in this case has been completed and the City of Lakewood has not been made a party. Due process of law prohibits the Administrative Law Judge from entering any orders relative to the City of Lakewood, because the city has not been notified that it is a party to this complaint and has not been given an opportunity to be heard. See Sections 24-4-105 (1), (2)(a), C.R.S. (1988 & 1996)

3. In any event, Lakewood's obligations under Section 117 of the Act did not come into play until the city council referred the urban renewal issue to the ballot on August 25, 1997. Section 117(1)(a)(l) (C) of the Act prohibits a public body from expending public money to urge electors to vote in favor of or against a referred measure. The articles in "Looking at Lakewood" and the television presentation had the effect of urging electors to vote for the creation of an urban renewal authority. However, no referred measure existed prior to August 25, 1997. Thus, Lakewood's expenditures made and information presented prior to August 25 did not yet apply to a referred measure. In addition, no expenditures have been made or information presented regarding the urban renewal question since August 25. Lakewood has therefore not violated Section 117(1)(a)(l)(C) of the Act.²

4. Section 117(1)(a)(1)(B) of the Act provides that a public entity can not expend funds to urge electors to vote for or against a 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. Section 31-11-111(2), C.R.S. (1996) governs the submission by the legislative body of a municipality of a resolution or any question to a vote of the registered electors of the municipality. Therefore, Section 117(1)(a)(1)(B) is also applicable to this case.

Section 31-11-111(2) requires the legislative body of a municipality or its designee to fix a ballot title for a referred measure. Section 117(1)(a)(1)(B) of the Act applies only

when a local ballot issue has been submitted for the purpose of having a title fixed or has had a title fixed. A ballot title is defined as the language printed on the ballot that is comprised of the submission clause and the title. Section 31-11-103(1), C.R.S. (1996). The title of a ballot question is a brief statement that represents the intent of the referred measure. Section 31-11-103(5), C.R.S. (1996). The submission clause is the language attached to the title to form a question that can be answered "yes" or "no". Section 31-11-103(4), C.R.S. (1996).

The resolution passed by the Lakewood City Council on August 25, 1997, contained a submission clause (the "yes/no" questions), but no ballot title. A ballot title may be fixed by a designee of the council. Section 31-11-111(2), C.R.S. (1996). The council resolution delegated to the city clerk the authority to take all necessary actions regarding the holding of an election on the urban renewal question. Those actions would of necessity include fixing a ballot title.

Thus, the Lakewood City Council did not submit the urban renewal ballot issue for the purpose of having a title fixed until August 25, 1997, when the council passed the resolution to refer this issue to the electorate and directed the city clerk to take all actions necessary to hold an election on the matter. The prohibition of Section 117 of the Act against expending public funds or making contributions to urge electors to vote in favor of or against any local ballot issue did not come into effect until the issue was so submitted on that date. Section 1-45-117(1)(a)(I)(B), C.R.S. (1997).

As noted above, the articles in "Looking at Lakewood" and the television presentation had the effect of urging electors to vote for the creation of an urban renewal authority. However, none of the conduct in question took place relative to a local ballot issue which had yet been submitted for the purpose of having a title fixed, or which actually had a title fixed. That ballot issue did not come into existence, and was not submitted for title fixing, until August 25, 1997. All of the conduct complained of occurred prior to that date. Accordingly, there has been no violation of Section 117 of the Act.³

5. Section 117(1)(b)(I) of the Act permits a government entity to issue a balanced factual summary on an issue before the electorate. Lakewood did not purport to issue such a summary regarding the urban renewal issue. Therefore, Lakewood's discussion of the urban renewal ballot question does not fall within the requirements of this section of the Act, and no violation of Section 117(1)(b)(I) has been established by the evidence.

INITIAL DECISION

It is the Initial Decision of the Administrative Law Judge that the complaints of Bonnie Ferguson and Norma Beard are dismissed.

Dated: September , 1997.

MARSHALL A. SNIDER
Administrative Law Judge

FOOTNOTES

1. The Complainants presented evidence that they did not earn a profit from the sale of T-shirts and that many of the flyers were printed at no expense. Whether this group actually was required to file as an issue committee because it had made expenditures or received contributions is irrelevant to the issues in this case, and the Administrative Law Judge makes no factual findings or legal conclusions in that regard.
2. In support of its position on this issue the Respondents have cited the order of former Secretary of State Natalie Meyer in *Kirk v. Frisco Lakefront* (October 6, 1993). In that Order the Secretary of State concluded that the requirements of the predecessor to the Act did not come into play until a public body drafted the ballot language and approved the submission of the question to the electorate. That case was decided under an earlier version of the Act, which did not contain language similar to Section 117(1)(a)(I)(C) of the Act. The *Kirk* order is thus not controlling in the present case, but does provide support for the conclusion reached in this matter.
3. Even though it was issued under a different statute, the *Kirk* order provides support for this conclusion. See footnote 2.

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