

BEFORE THE SECRETARY OF STATE
STATE OF COLORADO

CASE NO. OS 98-23

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ELECTIONS / LICENSING
SECRETARY OF STATE

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY DOUGLAS BRUCE REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY THE OFFICE
OF STATE PLANNING AND BUDGETING, GEORGE DELANEY, DIRECTOR, AND
STAFF MEMBERS**

On September 23, 1998, Complainant, Douglas Bruce filed a complaint with the Colorado Secretary of State against the Respondents, the Office of State Planning and Budgeting, George Delaney, Director, and staff members. The complaint alleged that Respondents violated the Fair Campaign Practices Act, Section 1-45-101, *et seq.*, C.R.S. (1997). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings for the purpose of conducting a hearing under the provisions of Sections 24-4-105(14)(a) and 1-45-111(2)(a), C.R.S. 1998.

A hearing was held in Denver, Colorado, before Margot W. Jones, Administrative Law Judge (ALJ), on October 7, 1998. Complainant, Douglas Bruce, appeared at hearing and represented himself. Respondents, the Office of State Budgeting and Planning, George Delaney, Director, and the staff members, were represented by Richard W. Daily, Esq., Powers Phillips, P.C. The ALJ issues this Agency Decision pursuant to Sections 24-4-105(14)(a) and 1-45-111(2)(a), C.R.S. 1998.

In this Agency Decision, the Fair Campaign Practices Act shall be referred to as "the Act"; the Office of State Budgeting and Planning as "OSPB"; Douglas Bruce as "the Complainant" or "Bruce"; George Delaney as "Delaney"; the Colorado Economic Perspectives as "CEP"; Article X, Section 20 of the Colorado Constitution as the "Tabor Amendment"; and Colorado Revised Statutes as "C.R.S..

STATEMENT OF THE ISSUES

Respondents are alleged to have violated the Act by publishing a document, entitled Colorado Economic Perspectives, on September 14, 1998. The CEP was distributed to the Governor, the General Assembly, and 759 individuals or entities that expressed interest in receiving the publication. It is intended to provide a quarterly report of economic forecasts for the state. It is alleged by Complainant that the September 14, 1998 issue of the CEP contained information which violated the Act, Section 1-45-117(1)(a)(I)(A), C.R.S. 1998, because the information in the CEP constitutes an expenditure of public money by a state agency to urge electors to vote in favor of a State wide ballot issue. Bruce maintains that the CEP urged voters to vote in favor of Referendum B.

FINDINGS OF FACT

1. Douglas Bruce, the Complainant, is a resident of Colorado Springs, CO and a registered voter in Colorado. He is the author of the Tabor Amendment.
2. The Tabor Amendment was approved by Colorado voters in 1992. It limits the annual growth of the state fiscal year spending. When revenues exceed the state fiscal year spending limitation for any given fiscal year, the Tabor Amendment, Section 20(7)(d) of Article X of the Colorado Constitution, requires that the excess revenues be refunded in the next fiscal year unless voters approve a revenue change allowing the state to keep the revenue.
3. Revenues are currently estimated to exceed the state fiscal year spending limitations for the 1997-98 state fiscal year. Referendum B is on the November 3, 1998 ballot for consideration by the voters. Referendum B, if approved, would permit state government to retain \$200 million or \$1 billion over five years for highway construction and repair, K-12 school emergency construction and safety needs, and higher education spending.
4. House Bill 98-1256 is the legislative enactment which placed Referendum B before the electors on the ballot on November 3, 1998. As the Tabor Amendment requires, it places the question on the November 3 ballot whether the state revenue excesses may be spent on roads and education.
5. The OSPB is created in the office of the Governor by Section 24-37-101, *et seq.*, C.R.S. (1998). George Delaney is the Director of the OSPB and he has a staff

of 15 employees. Delaney reports to the Governor and serves at his pleasure. The OSPB is required to publish a quarterly report of economic forecast for the state. The report is prepared by Delaney and the OSPB staff and is called the CEP. By law, the report is required to be presented to the Governor and the General Assembly. In fact, the CEP expresses the views of the Governor on economic matters.

6. The December and June CEP quarterly reports are 40 pages in length with regional analyses. The March and September CEP is considered an update of the information supplied in December and June. The September 14, 1998 CEP is a document produced on 8 and 1/2 by 11 paper consisting of 12 pages.

7. The CEP was scheduled to be published on September 20, 1998. Delaney was directed by the Governor to publish and distribute the CEP a few days early, on September 14th, to coincide with a special session of the legislature during which legislators were considering how to use the state's excess revenues. Delaney testified that the Governor wanted legislators to be reminded of the fact that a substantial portion of the excess revenues would be returned to Colorado citizens if Referendum B is not passed.

8. As a courtesy, the CEP is mailed to any interested party who expresses an interest in receiving the publication. On September 14, 1998, the CEP was sent to 904 individuals. This number includes 100 legislators, the Governor, 44 members of the Governor's cabinet, 43 members of the press, 267 members of the public sector, including state government, local governments, libraries, schools, and Federal offices in Colorado, and 449 members of the private sector.

9. The contents of the September 14 CEP was placed on the Internet. Delaney learned of Bruce's complaint shortly after the September 14 publication of the CEP and removed the publication from the Internet.

10. The exact cost of publication of the September 14 CEP was not established at hearing. The cost of supplies and mailing of the publication was \$707.19.

11. The first six and one half pages of the September 14 CEP provided a general economic forecast for the state. The remaining five pages are devoted to encouraging the passage of Referendum B. The discussion of Referendum B begins by describing the referendum as an "investment package" and states that "[t]here are

three reasons why the voters should allow the state to retain \$200 million of the surplus per year for the next five years." The article continues for five pages to explain that roads and schools are deteriorating and that excess revenues should be used for these purposes. It is asserted that it is important to make investments while there are revenue excesses in order to provide for the needs of the state during the inevitable times of recession.

12. At no point in the September 14 CEP is it explained why Referendum B should be defeated, why the excess revenues should be returned to Colorado citizens, or why the revenues should be spent on things other than roads or school.

13. Delaney conceded at hearing that the September 14 CEP advocated for passage of Referendum B and provided no information about why the Referendum should be defeated.

DISCUSSION AND CONCLUSION OF LAW

1. **The September 14, 1998 publication of CEP by the OSPB, through its Director, George Delaney, and its staff, expressing support for the passage of Referendum B is covered by the Act, Section 1-45-117(1)(a)(I)(A).** This provision states that no state agency shall expend public money to urge electors to vote in favor of a state wide ballot issue. Respondents maintained as a preliminary matter at hearing that the complaint should be dismissed to the extent that Complainant is challenging the contents of the September 14 CEP and its reference to the Tabor Amendment. Respondents contend that since the Tabor Amendment was passed into law in 1992 reference in the CEP to the amendment cannot be challenged under the Act. In other words, Respondents maintain that they cannot be found to have improperly urged voters to vote in favor of legislation that has already been passed into law. Respondents' motion to dismiss was denied as a preliminary matter. Respondents did not reassert the motion later in the proceeding.

The ALJ has jurisdiction to consider this matter under the provisions of Section 1-45-117(1)(a)(I)(A). It is undisputed that the OSPB is a state agency and that it expended public money to publish the CEP. The facts are further undisputed that the September 14 CEP pertains, at least in part, to Referendum B, a state wide ballot issue on the November 3, 1998 ballot. Complainant argues that OSPB, its Director and staff, attempted to sway the opinion of electors to vote in favor of Referendum B. This conduct, if established, is proscribed by the Act and is therefore properly before the ALJ.

2. The evidence presented at hearing established that Respondents are responsible for expending public funds to publish the September 14 CEP which urged electors to vote in favor Referendum B. The purpose of the Act is "to assure that government does not affect the democratic electoral process by taking sides and bestowing 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). The Act proscribes government action which provides an unfair advantage to one side over the other in the electoral process by utilizing public funds to propagandize for or against a particular issue. *Mountain States Legal Foundation v. Denver School District, supra*. The evidence established at hearing that this is precisely the impact of the OSPB's September 14 publication: it utilizes public funds and has the effect of urging voters to vote for Referendum B, in violation of Section 1-45-117(1)(a)(I)(A).

Respondents, when not admitting violation of the Act, argue that the September 14 CEP falls within an exception to the proscriptions of Act. Respondents maintain that the CEP is a vehicle through which the Governor communicates his opinion to the public, and particularly to legislators. Respondents maintain that the Governor should not be prevented from making use of the OSPB publication for this purpose and therefore an exception to the Act should be deemed to exist to cover the situation raised by this appeal. The Administrative Law Judge disagrees with this argument and any argument that Respondents fall into the exceptions under the Act.

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 1-45-117(1)(a)(II). In this case, however, there is no indication that the OSPB received questions, unsolicited or otherwise, about Referendum B. Delaney testified that he was directed by the Governor to publish the quarterly CEP a little early on September 14 in order to remind legislators about Referendum B and the importance of its passage. Thus, the September 14 CEP cannot fall within this exception.

Section 1-45-117(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 CEP does not fall within this exception to the Act for two reasons. First, the article presents the Governor's official position, and not the opinion of any individual employee of the OSPB. Thus, the public moneys expended by the OSPB in producing the CEP cannot reasonably be described as an activity incidental to an individual OSPB employee

expressing his or her opinion concerning the ballot issue. Furthermore, the amount expended on the newsletter (in excess of \$700, plus staff time associated with producing the CEP) exceeds the \$50 limit permitted under this Section.

The Act provides that a covered agency such as the OSPB 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 CEP article at issue here does not fall within this exception because it does not include arguments unfavorable to Referendum B and contains the explicit conclusion or opinion that Referendum B is good for the state and urges voters to vote in favor of it.

As noted above, the CEP constitutes the official position of the Governor concerning passage of the referendum and its effect on the state's infrastructure needs. Therefore, it cannot be characterized as the expression of the personal opinion of an elected official under Section 1-45-117(1)(b)(II).

Section 1-45-117(1)(b)(III)(A), permits covered entities, such as the OSPB, to take positions of advocacy on issues covered by the Act. The issue is whether the expenditures of public moneys connected with the CEP publication were proper under the Act.

The Act, Section 1-45-117(1)(b)(III)(B) permits covered entities, such as the OSPB, 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. In this case, there was no resolution passed by OSPB about which it was reporting in the September 14 CEP.

Section 1-45-117(1)(b)(III)(C) 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 the September 14 CEP.

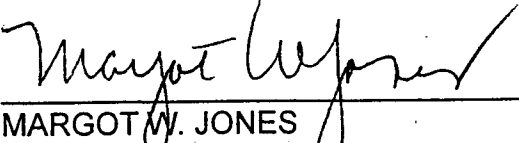
Respondents spent a substantial amount of time at hearing exploring with the witnesses what remedy could be fashioned by the ALJ to make amends for violation of

the Act. No remedy proposed by Respondents was deemed acceptable to Complainant. And, even more important, none of the remedies proposed by Respondents are within the authority of the ALJ to impose.

AGENCY DECISION

The Act provides, under Section 1-45-111(2)(a), for the Secretary of State to notify the Attorney General and the appropriate district attorney of the Act's violation. It is the Agency Decision of the ALJ that the Secretary of State shall so notify the Attorney General and the appropriate district attorney pursuant to Section 1-45-111(2)(a).

Dated: October 19, 1998.



MARGOT W. JONES
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the above AGENCY DECISION by depositing same in the U. S. Mail, postage prepaid, at Denver, Colorado to: Douglas Bruce, P.O. Box 26018, Colorado Springs, CO 80936; Richard W. Daily, Powers Phillips, P.C., 707 17th Street, Suite 3000, Denver, CO 80202; and by personal service on: Victoria Buckley, Secretary of State, 1560 Broadway Blvd. Suite 200, Denver, CO 80202, on this 19th day of October, 1998.



Secretary to the Administrative Law Judge