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BEFORE THE SECRETARY OF STATE  
STATE OF COLORADO

CASE NO. OS 98-29

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AGENCY DECISION

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IN THE MATTER OF THE COMPLAINT FILED BY TIMOTHY L. LEONARD, CANDIDATE FOR GOVERNOR, REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY STATE TREASURER BILL OWENS AND LT. GOVERNOR GAIL SCHOETTLER

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On October 5, 1998, Complainant Timothy L. Leonard ("Leonard") filed a complaint with the Colorado Secretary of State against Colorado State Treasurer Bill Owens ("Owens") and Lieutenant Governor Gail Schoettler ("Schoettler").<sup>1</sup> The complaint alleged that the Respondents had committed violations of the Fair Campaign Practices Act, Section 1-45-101 *et seq.*, C.R.S. (1998) ("the Act"). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings for the purpose of conducting a hearing pursuant to Section 1-45-111(2)(a), C.R.S. (1998).

The hearing in this matter was held in Denver, Colorado, on October 20, 1998, before Administrative Law Judge Marshall A. Snider. Timothy L. Leonard appeared without counsel. Respondents Gail Schoettler and Bill Owens were represented by Maurice G. Knaizer, Deputy Attorney General, and Elizabeth A. Weishaupl, Assistant Attorney General. The Administrative Law Judge issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (1998) and Section 24-4-105 (14)(a), C.R.S. (1998).

**STATEMENT OF THE ISSUE**

The issue to be determined is whether the Respondents violated the Fair Campaign Practices Act when they campaigned for elective office during regular business hours while receiving their salaries as public officials.

**FINDINGS OF FACT**

1. Gail Schoettler is the lieutenant governor of the State of Colorado and has held that office at all times relevant to this complaint. Schoettler is a candidate for the office of governor of Colorado in the November 3, 1998, general election.

2. Bill Owens is the treasurer of the State of Colorado and has held that office at all times relevant to this complaint. Owens is a candidate for the office of governor of Colorado in the November 3, 1998, general election.

3. Owens and Schoettler have been engaged in campaign activities for the Governor's race since at least April, 1998.

4. Schoettler and Owens have received their full salaries as lieutenant governor and treasurer of the state, respectively, during the entire 1998 gubernatorial election campaign. These salaries have been paid on a monthly basis at all times relevant to this complaint.

5. Neither Owens nor Schoettler have been compensated by their campaign committees for the time they have spent campaigning for the office of governor.

6. Since April, 1998, both Schoettler and Owens have on numerous occasions engaged in campaign activities between the hours of 9 a.m. and 5 p.m. on weekdays which were regular business days for the State of Colorado (this time period will be referred to in this Agency Decision as "regular business hours"). The Respondents also have spent many hours campaigning during lunch hours and at other times outside of regular business hours.

7. The evidence did not establish the exact number of hours which the Respondents have spent campaigning during regular business hours. Considering the statutorily set salaries of Schoettler and Owens, and assuming that these officials are paid for 40 hour work-weeks, the value of the time spent campaigning during regular business hours amounts to several thousand dollars for each of these Respondents.<sup>2</sup>

8. Owens and Schoettler do not perform their duties as officers of the state on a set schedule. During the time period relevant to this complaint the Respondents have performed these duties outside of regular business hours, as well as within regular business hours. At times, both Respondents have performed their official duties in the mornings before 9:00 a.m., on evenings, and on weekends. In addition, each Respondent has performed work related to their state offices while traveling to campaign meetings and appearances or while attending to other campaign duties.

9. Both Schoettler and Owens have carried out the responsibilities of their state offices as lieutenant governor and treasurer during the 1998 gubernatorial election campaign.

## **DISCUSSION**

### **JURISDICTION OF THE SECRETARY OF STATE AND THE ADMINISTRATIVE LAW JUDGE**

Leonard claims that the State of Colorado has made a contribution to the gubernatorial campaigns of Schoettler and Owens because the state has paid these candidates for the time they have spent campaigning for the office of governor. Leonard

asserts that this contribution violates certain provisions of the Act. However, the Respondents argue that the Secretary of State and the Administrative Law Judge have no authority to decide the issues raised by this complaint. According to the Respondents, the manner in which public officers spend their time in office is a non-justiciable political question over which an adjudicative official possesses no jurisdiction.

The courts have avoided deciding political questions on the basis of the constitutional separation of powers provision, which distributes governmental power among the executive, legislative and judicial branches of government. Colo. Const. art. III. See *Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 205 (Colo. 1991). The Administrative Law Judge will assume for the sake of decision that as an executive branch adjudicative officer the Administrative Law Judge is bound by the same constraints as judicial branch judges to avoid deciding political questions. Nevertheless, the issue in this case is not a non-justiciable political question.

The factors to be considered in determining whether an issue involves a political question include whether the question is constitutionally committed to another branch of government; whether there are no judicially discoverable and manageable standards for answering the question; whether the issue involves a policy determination which is inappropriate for the exercise of judicial discretion; whether a decision would express lack of respect for another branch of government; and whether a potential exists of many pronouncements by various departments on one question. *Colorado Common Cause v. Bledsoe, supra*. None of these factors are present in this case. The Act specifically assigns to an administrative law judge the responsibility to determine whether the Act has been violated. Section 1-45-111(2)(a), C.R.S. (1998). Therefore, this question is not constitutionally committed to another branch of government and no potential exists for multiple decisions by varying departments of government.

In addition, the standards for determining whether the Act has been violated are discoverable and manageable by the decision-maker; those standards are set forth in the requirements and prohibitions of the Act. Further, no policy determinations are necessary in deciding the issues presented in this case and a decision would not express disrespect for any other branch of government.

The issue in the present case therefore does not constitute a political question. Rather, under the Act an administrative decision-maker is charged with the responsibility to determine whether the Act has been violated. This is the type of question traditionally resolved by administrative adjudicators, and is therefore not a non-justiciable political question. See *Colorado Common Cause v. Bledsoe, supra* at 206; *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985).

## VIOLATION OF THE FAIR CAMPAIGN PRACTICES ACT

The Complainant asserts that the Respondents have caused the State of Colorado to contribute to their campaigns in violation of Sections 104(6) and 117 (1)(a)(I) of the Act. Section 117(1)(a)(I) of 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 in campaigns involving the nomination, retention, or election of any person to any public office . . . .

Section 104(6) of the Act provides that contributions can be made only by natural persons, political parties and political committees.

In addition, Leonard alleges that Schoettler and Owens have accepted contributions in excess of the \$500 permitted by the Act and have failed to disclose the receipt of those contributions as required by the Act. This conduct is alleged to violate Sections 1-45-104(2)(a) and 108(1), C.R.S. (1998).

The primary issue to be determined in this case is whether the state has made contributions to the Schoettler and Owens campaigns within the meaning of the Act. As relevant to the present case a contribution is defined as "[a]nything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election". Section 1-45-103(4)(a)(IV), C.R.S. (1998). Under this section of the Act the first question to be answered is whether the time of the lieutenant governor and state treasurer devoted to their campaigns is a thing of value. If so, a determination must be made as to whether this thing of value was given to a candidate by an agency of state government for the purpose of promoting the candidate's election. The Administrative Law Judge concludes that the time in question is a thing of value, but that this time was not given by the state to Schoettler or Owens as candidates for the purpose of promoting their election.

A. The Administrative Law Judge has previously concluded that the time of a high government official is a "thing of value" within the meaning of the Act. *In re Complaint Filed by Dick Sargent* (Case No. OS 97-14, Administrative Law Judge Marshall A. Snider, March 2, 1998). The analysis that was made in that case, involving the governor of Colorado, applies equally in the instant case. A "thing of value" means anything to which an economic, monetary or exchange value can be attributed. *People v. Becker*, 759 P.2d 26 (Colo. 1988). Owens and Schoettler receive annual salaries as lieutenant governor and state treasurer, respectively. Section 24-9-101(3)(a)(II), (VI), C.R.S. (1998). Thus, an economic, monetary or exchange value can be attributed to their time. Accordingly, the time of Schoettler and Owens as lieutenant governor and state treasurer constitute "things of value".<sup>3</sup>

B. Even though the time of the Respondents as state officials is a thing of value, the Administrative Law Judge concludes that the State of Colorado has not made a contribution to the Owens or Schoettler campaigns for the purpose of promoting the election of either of them to the office of governor. Accordingly, the Respondents have not violated the Act.

1. A distinction exists between state officers and state employees. *Corfman v. McDevitt*, 142 P.2d 383 (Colo. 1943); *Wilkerson v. State*, 830 P.2d 1121 (Colo. App. 1992). An officer is distinguished by the greater importance, dignity and independence inherent in the office held as compared to that possessed by employees. *Wilkerson v. State, supra*. In addition, an officer is required to take an official oath and perhaps give an official bond, and has tenure attached to the position. *Id.* The lieutenant governor and state treasurer are state officers under these criteria. These offices are created by the Constitution of the State of Colorado, which specifically refers to the holders of these positions as "officers". Colo. Const. art. IV, secs. 1, 3, 4. As two of only five members of the executive branch of government specifically identified in the constitution (Colo. Const. art. IV, sec. 1), these officers are invested with greater importance and dignity than employees of the state.

In addition, the lieutenant governor and treasurer serve in their offices for fixed terms. Colo. Const. art. IV, sec. 1. Both of the Respondents are required to take an oath of office [Colo. Const. art. XII, sec. 8; Section 24-22-101(1), C.R.S.; see *Hedstrom v. Motor Vehicle Division*, 662 P.2d 173 (Colo. 1983)], and the state treasurer is required to post a bond [Section 24-22-101(1), C.R.S.]. Therefore, the Respondents are state officers rather than state employees.

Unlike employees of the state, state officers are entitled to their salaries as an incident of their office, regardless of the services rendered. See *Periconi v. State*, 398 N.Y.S. 2d 959 (N.Y. Ct. Cl. 1977); *State ex rel. Godby v. Hager*, 177 S.E. 2d 556 (W.Va. 1970); 63C Am. Jur. 2d *Public Officers and Employees*, §§ 271-73 (1997). This principle was recognized by the Colorado Supreme Court in *Corfman v. McDevitt, supra*.

Therefore, although Schoettler and Owens receive annual salaries as state officers they are not paid their salaries in direct exchange for their time. Rather, they are paid salaries simply because they hold office, regardless of whether, when or how they perform the duties of the office. This fact does not mean that the time of the Respondents has no economic value. What it does mean is that specific, identifiable blocks of the Respondents' time (such as their time during regular business hours) are not paid for by the state. When these Respondents spend time on their election campaigns they are not contributing the value of their salaries, because no specific piece of their time is paid for by the state. Therefore, the time spent by the Respondents on campaign activities is their own and is not a thing of value which has been given to the campaigns by the state. Because no state agency has given a thing of value to the Respondents for the purpose of promoting their

election, no contribution has been made as defined in Section 1-45-103(4)(a)(IV), C.R.S. (1998).

2. Even if their salaries were paid directly in return for the Respondents' services as lieutenant governor and treasurer, the State of Colorado did not make a contribution to the campaigns of Schoettler and Owens. There is no legal requirement that the treasurer or lieutenant governor spend any particular amount of time carrying out the responsibilities of their offices. There also is no requirement that they perform their duties during regular business hours. The evidence established that the Respondents have performed their duties as state treasurer and lieutenant governor and that these duties were often carried out at times other than regular business hours. Therefore, the salaries paid to Schoettler and Owens were paid for the time they spent performing their official duties, whenever that time was expended. It follows that the time the Respondents devoted to their campaigns was not time for which they were being paid by the state, even if the campaign activities occurred during regular business hours.

Accordingly, even if the salaries of Schoettler and Owens were directly exchanged for their services, these salaries were not paid to the candidates for the purpose of promoting their election. The State of Colorado therefore did not make a contribution to the Respondents' election campaigns, as a "contribution" is defined in Section 1-45-103(4)(a)(IV), C.R.S. (1998).

3. The State of Colorado has not made a contribution to the Schoettler or Owens campaigns in violation of Sections 1-45-104(6) and 1-45-117(1)(a)(I), C.R.S. (1998). Consequently, the Respondents have not caused the state to make unlawful contributions to campaigns, have not accepted contributions in excess of the limits of the Act, and have not failed to disclose contributions as required by the Act. Sections 1-45-104(2)(a) and 108(1), C.R.S. (1998). The Respondents thus have not violated the Act as charged in the complaint.

### **CONCLUSIONS OF LAW**

1. The Secretary of State and the Administrative Law Judge have jurisdiction over this complaint.

2. Neither Lieutenant Governor Schoettler nor State Treasurer Owens has violated Section 1-45-104(2)(a), 104(6), 108(1) or 117(1)(a)(I), C.R.S. (1998).

**AGENCY DECISION**

It is the Agency Decision of the Administrative Law Judge that the complaint of Timothy L. Leonard against Respondents Bill Owens and Gail Schoettler is dismissed.

Dated: October 26, 1998.



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MARSHALL A. SNIDER  
Administrative Law Judge

## FOOTNOTES

1. Schoettler and Owens will be referred to in this Agency Decision either individually or collectively as "the Respondents".
2. During 1998 both Respondents received annual salaries of \$48,500. Sections 24-9-101(3)(a)(II), (VI), C.R.S. (1998).
3. Other authorities support the conclusion that personal services are considered a "thing of value". See Section 18-1-901(3)(r), C.R.S. (1997) (definition of the term "thing of value" for purposes of the criminal code includes "services"); *United States v. Croft*, 750 F.2d 1354 (7th Cir. 1984) (services of a government employee constitute a thing of value which can be unlawfully converted).

## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to Timothy J. Leonard, P.O. Box 1112, Kittredge, CO 80457; by courier pickup on Maurice G. Knaizer, Deputy Attorney General, and Elizabeth A. Weishaupl, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO 80203; and by personal service on Victoria Buckley, Secretary of State, 1560 Broadway, Suite 200, Denver, CO 80202, on this 20<sup>th</sup> day of October, 1998.

  
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Secretary to Administrative Law Judge

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