

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 98-42

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY FRATERNAL ORDER OF POLICE
LODGE 19 REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN
PRACTICES ACT BY THE CITY OF COMMERCE CITY**

On October 28, 1998, Complainant, the Fraternal Order of Police Lodge 19 (FOP 19), filed a complaint with the Colorado Secretary of State against Respondent, the City of Commerce City (Respondent), alleging violation of the Fair Campaign Practice Act (the Act), Section 1-45-117(1)(a)(I)(B) 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 pursuant to Section 1-45-111(2)(a), C.R.S (1997) of the Act.

The hearing in this matter was held on December 7, 1998 in Denver before Margot W. Jones, Administrative Law Judge (ALJ). Complainant was represented at hearing by Thomas B. Buescher, Esq. Respondent appeared through Thomas E. Merrigan, Esq. and Peter Dougherty, Esq. The ALJ issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (1997) and Section 24-4-105(14)(a), C.R.S. (1997).

The issue to be determined in this proceeding is whether Respondent violated the Act by expending public funds in connection with the production and public distribution of a pamphlet which urged electors to vote against a local ballot issue.

PROCEDURAL MATTERS

On October 29, 1998, this matter was referred to the Division of Administrative Hearings by the Secretary of State for a hearing. On October 30, 1998, this matter was set for an administrative hearing on November 9, 1998, as required by Section 1-45-111(2)(a), C.R.S. (1997). Following oral communication to the parties about the November 9 hearing date, on October 29, 1998, the parties jointly moved to continue the hearing date. The parties represented that neither they nor their witnesses were prepared to proceed at the hearing. The parties' joint motion to continue was granted and the hearing was rescheduled to December 7, 1998.

FINDINGS OF FACT

1. Respondent is a municipality located in the state of Colorado. FOP 19 is made up of the members of Respondent's police department. All police officers and full time community service officers are members of FOP 19, except for the Chief of Police, a Community Service Supervisor, one community service officer, and one police sergeant who are not members of FOP 19. David Hemingway is the President of the FOP 19.

2. In April 1998, FOP 19 sought the endorsement of Respondent's city council of a proposed collective bargaining amendment. FOP 19 wanted the city council to place the proposed charter amendment on the ballot.

3. FOP 19 asserted that the charter amendment would create greater stability in the police department work force and would result in encouraging recruits to join the force.

4. The city council refused to endorse the amendment and to place it on the November 3, 1998 ballot. Thereafter, FOP 19 circulated petitions to place the charter amendment proposal on the November 3, 1998 ballot. FOP 19 was successful in obtaining enough signatures to get the proposed charter amendment on the ballot.

5. On or about October 14 and 21, 1998, FOP 19 published in a local newspaper, the Commerce City Beacon, an advertisement encouraging voters to vote in favor of the charter amendment. The advertisement listed the reasons voters should vote for the amendment.

6. On or about October 22, 1998, Respondent mailed to registered voters a pamphlet which urged them to vote against the proposed charter amendment. The pamphlet was composed of two 8 and 1/2 by 14 inch sheets of paper which contained color printing and Respondent's logo. The contents of the pamphlet was composed by Respondent's employee who copied the contents of a pamphlet prepared in 1995 when the same proposal was on the ballot.

7. Respondent admits that the pamphlet only contained arguments against passage of the proposed charter amendment. Respondent further admits it sought no information from any source about arguments in favor of the charter amendment. The cost of preparation and distribution of the pamphlet was incurred by Respondent. Respondent utilized public funds to cover the cost of the pamphlet.

8. On November 3, 1998, the charter amendment for collective bargaining was passed into law by the voters, 58% to 42%.

DISCUSSION AND CONCLUSIONS OF LAW

1. **Respondent is a political subdivision of the state and the proposed charter amendment constituted a local ballot issue covered by the provisions of the Act.** Section 1-45-117(1)(a)(I)(B) provides that "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, nor shall any such entity expend any public moneys from any source, or make any contributions, to urge electors to vote in favor of or against any: . . . (B) Local ballot issue that has been submitted for the purpose of having the title fixed pursuant to Section 31-11-111 or has had a title fixed pursuant to that section.

The parties do not dispute the ALJ's jurisdiction to consider the complaint. The evidence presented at hearing established that Commerce City is a subdivision of the State and the collective bargaining amendment to the Commerce City charter proposed by FOP 19 was a ballot issue within the meaning of Section 1-45-117(1)(a)(I)(B).

2. **The evidence presented at hearing established that Respondent was responsible for the publication and dissemination at public expense of a pamphlet which urged voters to vote against a proposed Commerce City Charter amendment for collective bargaining.** The purpose of the Act is "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). 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 against 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.

The pamphlet produced by Respondent clearly and unequivocally urged voters to vote against the Charter Amendment. In the narrative portion of the pamphlet, it lists seven questions which it presumes a voter would like answered. It provides "answers" to each of the questions. However, these answers do not offer a balanced view of the merits of the amendment. The pamphlet was clearly intended to sway voters to vote against the proposed charter amendment, in violation of Section 1-45-117(1)(b)(I).

Respondent asserts that the pamphlet falls within the exception to the proscriptions of Act found in Section 1-45-117(1)(b)(I), C.R.S. (1997). The Administrative Law Judge disagrees with this argument.

The Act, in Section 1-45-117(1)(b)(I), provides that a political subdivision of the state such as Respondent may expend public moneys or make contributions in kind to dispense a factual summary with respect to any ballot issue 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 pamphlet at issue here does not fall within this exception because it does not include arguments favorable to passage of the charter amendment on collective bargaining. The pamphlet prepared by Respondent contained (at least implicitly) a conclusion or opinion that the proposed charter amendment is costly to taxpayers, will impede the city in its relationship with the police department and is unlawful to the extent that Respondent represents that the charter amendment includes a provision for binding arbitration.

AGENCY DECISION

Pursuant to Section 1-45-111(2)(a) C.R.S. (1997 Repl. Vol. 1), it is the decision of the ALJ that the Secretary of State shall notify the Attorney General and the appropriate District Attorney of Respondent's violation of Section 1-45-117(1)(b)(I) C.R.S. (1997 Repl. Vol. 1.)


DATED THIS 14
DAY OF DECEMBER, 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: Thomas B. Buescher, Esq., 1563 Gaylord Street, Denver, CO 80206; and to Thomas Merrigan, Esq., 6755 East 72nd Avenue, Commerce City, CO 80022-2196; and was hand delivered to Victoria Buckley, Secretary of State, 1560 Broadway, #200, Denver, CO 80202 on this 14th day of December, 1998.



Secretary to Administrative Law Judge