

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

CASE NO. OS 98-45

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY KATHYE WILDER AND SHEILA
TALBOT REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN
PRACTICES ACT BY FALCON SCHOOL DISTRICT 49**

On November 5, 1998, Complainants Kathye Wilder and Sheila Talbot filed a complaint with the Colorado Secretary of State against Falcon School District 49 (School District) generally alleging violations of the Fair Campaign Practices Act (the Act). The Secretary of State referred 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).

The hearing in this matter was held in Denver, Colorado, on November 18, 1998, before Administrative Law Judge (ALJ) Jewell K.G. Biddle. The Complainants appeared and were not represented by counsel; the School District appeared and was represented by Wm. Kelly Dude, Attorney at Law.

PRELIMINARY MATTER

At commencement of the hearing, the ALJ asked the parties whether they would be willing to extend the due date of the issuance of the Agency Decision from November 28, 1998, to December 11, 1998, due to currently docketed matters and the Thanksgiving holidays. The parties both assented to this request.

ISSUE TO BE DETERMINED

The issue to be determined is whether the School District violated the Act by expending public funds or making contributions in connection with the distribution of literature, the publication of articles in the school newspaper and newsletters, the use of School District facilities and employee time in connection with the distribution and mailing of a "blue card", all of which urged voters to vote in favor of a bond issue which appeared on the November 3, 1998, ballot.

FINDINGS OF FACT

1. The School District is a political subdivision of the State of Colorado.
2. Complainants are parents of children who attend school in the School District. The Complainants were opposed to the proposed bond issue which is the subject matter of this dispute.
3. Sometime before mid-September 1998, the Board of Education of the School District (Board) referred a bond issue for the local ballot. Although the date is unclear, there is no dispute that the conduct alleged to be in violation of the Act occurred after the bond issue was referred. The bond issue was also labelled as a local ballot issue during the hearing of this matter. There is, therefore, no dispute over whether the bond issue in question constitutes a local ballot issue so as to be covered by the Act.
4. Shortly after the bond issue was referred, the Commitment for Kids Committee (Committee) was formed to promote passage of the bond issue. The Committee was funded by donations from local builders and was organized to promote passage of the bond issue by publishing and distributing literature, holding "speaker's bureaus" and conducting phone calls to the School District citizen voters. The Committee conducted its operations both from private homes and also at the Disabled American Veterans hall.
5. In order to enlist volunteers for its cause, the Committee prepared and paid for a "blue card" for distribution to local voters. The blue card was the vertical one-half of a legal page in size, contained the School District's logo in the upper left-hand corner of one side above which were the words "Commitment for Kids". The card contained a space to check off whether you had children in school, which school, whether you supported the ballot proposal and what type of volunteer help you could give. There was also a brief description of the new facilities which would be funded by the passage of the proposal and a request to "Please return this card to any Falcon School or mail to addressee on front". The "addressee on front" was Dave Dempsey, 6455 Pawnee Circle, Colorado Springs, CO 80915, who was the Committee Chairman. Additionally, in the middle, bottom of the same side, were the words "(Printed by: Commitment for Kids)". Finally, on one end of the card was an absentee ballot request which could be cut from the card and mailed, preaddressed, to the El Paso County Clerk and Recorder.
6. Some of these blue cards were delivered to the various district schools by Mark Maksimowicz, the school superintendent. He picked up some blue cards from a printer at approximately 5:00PM (date unknown) and delivered part of the cards to schools in the west side of the School District immediately thereafter. He delivered the rest of the cards to schools in the east side of the School District the next morning on his way to work. There is no evidence regarding Mr. Maksimowicz'

salary.

7. The school superintendent's job has no specified working hours. Rather, it essentially entails working around the clock, handling whatever needs to be handled.

8. Mr. Maksimowicz also passed out some blue cards to school principals at an "Administrator's Meeting" in October 1998. He advised the principals not to distribute the blue cards during school hours.

9. Blue cards were placed in various school lobbies and offices for distribution to parents. They were also handed out by teachers at Fall parent-teacher conferences which were held at the schools after regular school hours.

10. On October 1, 1998, the Falcon Elementary School Building Accountability Committee (BAC) met. Willard McQuary, campaign coordinator for the Committee, attended and spoke at the meeting as "a speaker's bureau type thing". He took one blue card with him to show to the attendees and talked to them about "how much the bond issue needed to pass". Sometime during the meeting an attendee left to procure more blue cards; Mr. McQuary left before her return and there is no evidence of whether more blue cards were passed out at the meeting. The Complainants also appeared at the meeting and spoke against the bond issue.

11. On October 20, 1998, Mr. Maksimowicz sent a memo to all building principals regarding the November 3rd election:

Please include a reminder with any correspondence you send to parents between now and November 3, to vote on November 3 **for the \$15.9 million bond issue** for the Falcon School District.

The bond issue includes

- a new elementary school in the east (Woodmen Hills area)
- a new middle school in the west (near Marksheffel & Barnes)
- a \$1.36 million energy conservation project for the existing schools (This is a projected savings of \$200,000 per year per student)

Thank you for your assistance. (Emphasis added.)

12. Sometime in October 1998, Mr. Maksimowicz, along with the help of Benita Richardson, prepared a memo which was faxed from the Central Office to Falcon Elementary School for its inclusion in the next newsletter. The text of the memo, in its entirety, was published in the Falcon Elementary School's October

newsletter under the title "School Bond Election November 3". The text of the memo and article follow, with the alleged offensive language highlighted:

A successful bond election would provide relief for Falcon Elementary. A new elementary school for 450 children would be built in the Eastern part of the district. We would be able to use our core facility more efficiently and eliminate the modularity that currently house 300 students. A new elementary school would enable Falcon Elementary children to have more gym time and a shorter lunch hour. We would be able to have additional library time available for children to do research and individual projects. We would no longer have teachers who work on carts and children who have to come into the building to go to the restroom.

The other parts of the bond election include: a) a 600 student middle school in the western part of the school district; b) a \$1.36 million for new systems and equipment to reduce energy consumption in existing schools and c) additional classrooms in existing elementary schools if funds remain after the above projects are completed.

The cost to the taxpayer for the \$15.9 million bond issue will be \$3.95 per month per \$100,000 home value. The last day to register is October 5th in order to be eligible to vote on the bond issue on November 3rd. Voter registration forms are available in our main office as well as all of the Falcon schools.

If you have questions, please feel free to call Falcon Elementary administration at 495-2256. Please remember to vote November 3rd.

13. In October 1998, the School District published the *Falcon Flyer* newspaper, the front page of which was used solely for information concerning the bond issue. The title of the page was "Commitment for Kids' Committee Dedicated to Passing Bond Issue". A half-page article written by Kimber Solberg, Editor, described the formation of the Committee. It also included the following language which was cited by Complainants as in violation of the Act: "[A] successful bond will fund two schools for District 49 students. The new school buildings will be located in the district to relieve two of the most overpopulated schools, Falcon Elementary School and Horizon Middle School. The Board of Education has therefore planned to place the elementary school in the eastern portion of the district and a middle school in the western portion of the district." The Complainants also complain that the tenor of the entire article is one favoring passage of the ballot proposal and urging its support by the voters.

14. There was no cost to the School District for the inclusion of the article above-described in Paragraph 13. Ms. Solberg is not paid on the basis of stories produced or inches of type included in the particular edition. Had she not written this article, another article would have appeared in its stead.

15. An undated article written by Melissa Urbaniak, *The Stinger* news editor,

appeared in Volume 2, Issue 1, of the *News*, and was also cited by Complainants as evidence of a violation of the Act. The language complained of is a quote from Melissa's father, the vice president of the Board: "[I]t is critical that patrons vote on this issue. If the bond fails, our other alternatives to ease the overcrowding problems could be adding more modulars, multi-track and larger class sizes. We need members of the district to support this."

16. Complainants additionally complain that: (a) a Committee flyer entitled "Why Vote Yes on 3G", handed out to parents at the Fall parent-teacher conference, clearly promotes the bond issue and describes how the bond issue could improve the School District; and (b) that a phone bank script, drafted by the Committee for use in their phone calls, was used by teachers while making volunteer phone calls. There is no evidence that teachers made phone calls during any school hours or other paid school time.

17. There was no evidence regarding the cost or value of using the school fax machine, putting up tables where blue cards were placed, using teacher time for passing out blue cards or other flyers, or of any additional cost to the School District in printing the articles regarding the bond issue in the school newspaper and newsletters.

18. Finally, Complainants also complained about a public address system announcement made at Sand Creek High School soliciting volunteers for the Committee. However, all testimony was hearsay and accordingly, will not be set forth in these findings.

DISCUSSION

Complainants initially specifically complained of four actions by the School District:

1. That literature was distributed in the schools specifically telling people to vote "yes" on the bond issue;

2. That the *Falcon Flyer* article urged people to vote in favor of the bond issue and that because they were paid for by the School District, they constituted a contribution of School District funds;

3. That on October 23, 26 and 29, School District equipment was used to promote the bond issue; and

4. That the blue cards were distributed at the BAC meeting and also by the school superintendent, in violation of the Act.

At hearing, the Complainants expanded their allegations to include the distribution of the newsletter articles.

Section 1-45-117(1)(a)(I)(B), C.R.S. 1998, provides that a political subdivision may not expend any public moneys or make any contributions to urge electors to vote in favor of or against any local ballot issue which has been submitted for the purpose of having a title fixed. The relevant definition of "contribution" is the fair market value of any gift or loan of property made to an issue committee. See Section 1-45-103(4)(a)(III), C.R.S. 1998.

Whether there was an expenditure of public moneys

Section 1-45-103(6), C.R.S. (1998), defines "expenditure" as the payment, distribution, loan, or advance of money by an issue committee; "expenditure" also includes the payment, distribution, loan, or advance of money by a person for the benefit of an issue committee. There was no evidence presented of any payment, distribution, loan or advance of money by the Committee of School District funds or by a person of the School District for the Committee. The Complainants have, therefore, failed to prove that the School District violated the Act by the expenditure of public moneys.

Whether there was a contribution made by the School District

Section 1-45-103(4)(a), C.R.S. (1998) defines "contribution" as:

- (I) The payment loan, pledge, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, or political party;
- (II) Any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, or political party;
- (III) The fair market value of any gift or loan of property made to any candidate committee, issue committee, political committee, or political party;
- (IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.

The issue, therefore, is whether the School District, by actions taken in drafting a newsletter article, publishing newsletters and the newspaper, using its fax machine to send a memo to Falcon Elementary School, paying its employees for time spent setting up tables or passing out blue cards, *etc.*, made a contribution by: (1) the payment, loan, pledge, or advance of money...to the Committee; (2) a payment to a third party for the benefit...of the Committee; (3) a gift or a loan of property...to the Committee; or (4) giving something of value given to a candidate.

None of the actions complained of were a payment, loan, pledge, or advance of money; likewise, none of these actions constituted payments to a third party for the Committee's benefit. The actions were also not something of value given to a candidate. The only remaining question is, therefore, whether the actions constituted a gift or loan of property to the Committee. In order to determine whether a gift or loan of property was made to the Committee, the amount of its fair market value would first need to be determined. No evidence was presented regarding the cost of printing newsletters or the newspaper, or of employee time spent preparing, drafting, etc., the newsletters or newspapers, employee time spent setting up tables in lobbies or of handing out blue cards to teachers during parent-teacher conferences. Moreover, these actions would fall under the category of "services" rather than "property". In any event, although there is apparently some cost to the School District for the use of its fax machine, its publication of newsletters or the newspaper and its employees' time spent doing the things alleged, there was no evidence regarding the value of any of these actions. Where there is no competent evidence in the record supporting the argument that public moneys were expended (or, as here, contributed), there can be no finding of an expenditure (or contribution) in violation of the Act. *Regents of the University of Colorado v. Meyer*, 899 P.2d 316 (Colo. App. 1995). Therefore, the ALJ concludes that the Complainants have failed to prove that the School District made a contribution of public moneys to urge voters to vote in favor of the passage of the bond issue.

The ALJ notes parenthetically that even assuming that the use of Mr. Maksimowicz' time, in picking up and distributing the blue cards and/or preparing the two memos set forth in the Findings of Fact, constitutes a contribution of public moneys, it likely falls within the statutory exception allowing an employee of a public entity to expend/contribute up to fifty dollars to express his opinion on a ballot issue. See Section 1-45-117(1)(a)(II), C.R.S. (1998).

Whether the School District's actions urged electors to vote in favor of the bond issue

In light of the disposition of the above issues, the ALJ need not address this issue.

CONCLUSIONS OF LAW

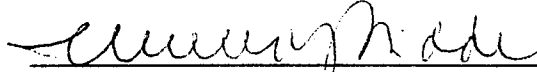
1. The Secretary of State and the ALJ have jurisdiction over the School District and the subject matter of this complaint.
2. The Complainants have failed to prove, by a preponderance of the evidence, that the School District violated Section 1-45-117(1)(a)(I)(B) of the Act.

AGENCY DECISION

It is the Agency Decision in this matter that the complaint be dismissed

DONE AND SIGNED:

December 11, 1998



JEWELL K.G. BIDDLE
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above AGENCY DECISION was placed in the U.S. Mail, postage prepaid at Denver, Colorado to: Kathy Wilder, 15606 Softwood Road, Elbert, CO 80106; Sheila Talbot, 17410 Goshawk Road East, Black Forest, CO 80908; and Wm. Kelly Dude, 104 S. Cascade Ave, Suite 204, P.O. Box 240, Colorado Springs, CO 80901-0240; and via State InterAgency mail to Victoria Buckley, Secretary of State, 1560 Broadway, 2nd Floor, Denver, CO 80202 on this 11th day of December 1998.



Secretary to the Administrative Law Judge