

non-advocacy

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY DOUGLAS BRUCE REGARDING THE ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY GOVERNOR BILL OWENS, HEATHER WITWER, MIKE BEASLEY, TOM NORTON, HEATHER DUGAN, CARLA PEREZ, and JENNIFER WEBSTER

A hearing was held on August 20, 1999, before Administrative Law Judge Martin D. Stuber concerning the complaint filed with the Secretary of State alleging violations by these respondents of the Fair Campaign Practices Act, Sections 1-45-101 to 118, C.R.S. ("FCPA"). Complainant, Douglas Bruce, represented himself. Respondents Governor Bill Owens, Heather Witwer, and Mike Beasley were represented by Michael E. McLachlan, Solicitor General, and Britt I. Haley, Deputy Counsel to the Governor. Respondents Tom Norton, Heather Dugan, Carla Perez, and Jennifer Webster were represented by Elizabeth A. Weishaupl, First Assistant Attorney General, and Harry S. Morrow, First Assistant Attorney General.

The complaint was filed on August 9, 1999. A prehearing conference was held on August 17. A prehearing order entered to govern the prehearing process. Governor Owens filed a motion to dismiss the complaint as to him pursuant to C.R.C.P. 12(b)(5) for failure to state a claim upon which relief could be granted. The motion was argued at hearing and was denied. Governor Owens testified by telephone. All other witnesses appeared in person. The Administrative Law Judge issues this Agency Decision pursuant to section 1-45-111(2)(a) and section 24-4-105(14)(a), C.R.S.

STATEMENT OF THE ISSUE

The issue to be determined is whether the named Respondents violated the FCPA by urging the electors to vote for Referendum A after June 2, 1999.

FINDINGS OF FACT

1. At all times pertinent to this complaint, Governor Bill Owens was the duly elected Governor of the State of Colorado. The governor earns a salary of \$90,000 and

receives use of the governor's mansion, a state airplane, and a motor vehicle. The governor also receives full-time security services, expense accounts, and other fringe benefits.

2. At all times pertinent to this complaint, Tom Norton was the Executive Director of the Colorado Department of Transportation (hereinafter "CDOT"). Norton's duties include both policy-making and administrative decisions for CDOT. The Transportation Commission determines many policies for CDOT, including highway spending priorities. Norton, in his role as Executive Director, implements Transportation Commission decisions and determines policies for CDOT. Norton receives an annual salary of over \$100,000 plus fringe benefits. Norton typically works 10-12 hours per day and averages approximately 65 hours of work per week.

3. At all times pertinent to this complaint, Heather Witwer was Deputy General Counsel to Governor Owens. Witwer's duties include advising the Governor and his office on legal, legislative, and policy matters. Witwer earns a salary of \$54,000 plus health insurance benefits.

4. At all times pertinent to this complaint, Mike Beasley was legislative liaison to Governor Owens. Beasley's duties include advising and assisting the Governor in the governor's legislative agenda and initiatives and communicating with other governmental agencies and the general public. Beasley earns a salary of \$63,500.

5. At all times pertinent to this complaint, Heather Dugan was the director of the office of financial management of CDOT. Dugan's duties include preparing budgets and financial analysis for CDOT and communicating such information to other governmental entities and the general public.

6. At all times pertinent to this complaint, Carla Perez was the director of policy at CDOT. Perez's duties included advising and assisting CDOT on legislative matters and communicating with other governmental entities and the general public.

7. At all times pertinent to this complaint, Jennifer Webster was legislative liaison for CDOT. Webster's duties include advising CDOT on legislative matters and initiatives and communicating information to other governmental agencies and the general public.

8. The complainant, Douglas Bruce, is a citizen of the State of Colorado.

9. The Office of Legislative Council is the non-partisan research arm of the Colorado General Assembly. The Office of Legislative Council provides the general

assembly with research services and prepares memoranda and publications as required by the general assembly.

10. The 1999 Ballot Analysis Summary, commonly referred to as the "Blue Book," is a publication that contains the text and title of each referred or initiated measure to be voted on in the November 1999 election, as well as a fair and impartial analysis of each measure with a summary and major arguments for and against each measure.

11. The staff at the Office of Legislative Council initiates the preparation of the Blue Book by soliciting interviews with a list of persons deemed knowledgeable about the ballot measure in question. These interviews are conducted prior to circulation of the first draft of the summary for the Blue Book. Drafts of the summary are then forwarded to the persons on the "solicitation list" for comment prior to preparation of the final draft for publication. Complainant Bruce and Respondents Webster, Dugan, and Beasley were on the solicitation list for Referendum A.

12. In the 1999 session of the General Assembly, Governor Owens sought passage of several highway funding measures. Witwer was a member of a five-person drafting team that wrote H.B. 99-1325. Beasley was involved in lobbying the General Assembly for passage of that bill and many others. Witwer had conversations with individual legislators to answer questions about the bill. In approximately March 1999, an unknown member of the staff in the governor's office prepared a factual summary sheet ("Response Sheet") to assist the governor's office staff in answering questions from legislators and the general public about the proposal.

13. On June 2, 1999, Governor Owens signed H.B. 99-1325 which set a referred measure for the November 1999 ballot. The referendum ("Referendum A") concerns a means for funding certain priority highway projects authorized by the Transportation Commission through the issuance of bonds. These bonds are referred to as Transportation Revenue Anticipation Notes ("TRANS").

14. Referendum A would significantly impact CDOT's operation and programs. Norton, Dugan, Perez, and Webster were responsible for planning CDOT operations in the event that Referendum A passes or in the event that it is defeated.

15. CDOT publishes *Transpo Topics*, a monthly newsletter for distribution to departmental employees. Norton frequently writes an article for the monthly publication and spends approximately 45-60 minutes per article. CDOT's public relations office edits the articles. The newsletter is distributed with the monthly paychecks or paystubs.

The publication costs for the newsletters were \$144.67 for the May issue, \$156.94 for the June issue, \$158.50 for the July issue, and \$143.81 for the August issue.

16. In April 1999, Norton wrote an article for the May CDOT newsletter to inform CDOT employees about the status of the pending legislation. Although no specific testimony was produced as to the publication date, the content of the newsletters and the calendar of events for May would indicate that the May newsletter would be distributed at the end of April. At the end of May 1999, Norton wrote another article for the June CDOT newsletter dealing with various aspects of highway safety. This article informed CDOT employees about the placement of Referendum A on the ballot.

17. On May 18, Governor Owens stated at a press conference that he would hit the "oatmeal circuit" to support the adoption of Referendum A. On May 21, Governor Owens traveled to the San Luis Valley and to Durango to urge adoption of Referendum A as well as to address other issues.

18. On May 25, in response to statements by Bruce, the Office of Legislative Council decided to revise the questions that would be asked of CDOT and Office of the Governor employees to attempt to elicit only factual and technical information and to avoid statements of advocacy of Referendum A by those state employees during the Blue Book process.

19. Immediately after Governor Owens signed H.B.99-1325 on June 2, 1999, Bruce notified the governor that Bruce expected that the governor would not expend more than \$50 in campaigning for Referendum A. Governor Owens stated publicly that he would support Referendum A and that the state would pay travel costs while he spoke for Referendum A.

20. Governor Owens almost always travels with security officers due to continual threats against the governor. Governor Owens travels to various points in the metro Denver area on virtually a daily basis to give speeches. Governor Owens travels to other points in the state from time to time. The governor's staff makes all arrangements for speeches and for travel. On some, but not all, occasions, Governor Owens has other staff members present with him during his public appearances. In approximately one-half of his public appearances since June 3, 1999, Governor Owens has spoken in favor of Referendum A.

21. Governor Owens did not instruct Norton or any of the staff of the Office of the Governor or of CDOT to speak in public in favor of Referendum A.

22. On June 3, the Office of Legislative Council interviewed Dugan, Perez, and Webster concerning Referendum A. These CDOT employees answered all questions that they were capable of answering at that time. They requested the opportunity to file a written answer to some of the questions. The Office of Legislative Council scheduled an interview time for Beasley, but Beasley later canceled it and did not give an interview to that Office.

23. On July 1, 1999, Norton provided to the Office of Legislative Council written submissions regarding the Strategic Transportation Project Investment Program ("7th Pot") and the TRANS financing. The written submission was prepared by Dugan, Perez, and Webster and was reviewed by Norton.

24. On July 8, David Hite, Deputy Director of the Office of Legislative Council, mailed the first draft of the Blue Book to all persons on the solicitation list, including Webster, Dugan, and Beasley. Hite's cover letter solicited any comments or questions on the draft. On July 16, Geoffrey Johnson, research associate for the Office of Legislative Council, sent e-mail reminders to Beasley, Webster, and Perez requesting any comments on the first draft to be submitted by July 20.

25. On July 20, Webster prepared a first draft of CDOT comments on the first draft of the Blue Book. Webster sent a copy of the draft to Witwer and Beasley and invited comments. All departmental legislative liaisons, including Webster, are required by the governor's office to share with Beasley any communications with the legislature. Witwer and Beasley did not provide any comments to CDOT. Norton then sent the July 20 memo to Hite to provide comment on the Office of Legislative Council's first draft of the Blue Book. Norton's memo recommends, *inter alia*, changing a reference from "spending" to "investment."

26. On July 20, Witwer, on behalf of the Governor's Office, replied by memo to the Office of Legislative Council's request for comments on the first draft. Witwer sent a copy of the memo to Mike Johnson, a municipal finance expert who had been hired by the Office of the Attorney General and the Office of the Governor to participate as a member of the team drafting H.B. 99-1325. Footnote 3 of the memo suggested reference to a 5% interest rate on the notes and cited a recent survey of investment bankers by the Office of the Governor. In fact, the information from investment bankers had been provided by Mike Johnson to Witwer on June 1, 1999.

27. On July 27, Hite sent the second draft of the Blue Book to all persons on the solicitation list, including Webster, Dugan, and Beasley. Hite's cover letter again solicited suggestions and comments. On August 5, Norton responded to Hite by submitting CDOT comments on the second draft of the Blue Book. Webster prepared

the August 5 memo for Norton's review. Norton's memo questions the reason for changing the draft reference from "priority highway" to "selected transportation" projects and makes other suggestions.

28. On August 6, Witwer prepared the Governor's Office response to the second draft. Witwer sent a copy of the August 6 memo to Webster at CDOT by e-mail file attachment. Witwer's actions in commenting on both the first and second drafts of the Blue Book were directed solely at improving the accuracy of the Blue Book. On August 11, after the filing of the complaint in this matter, Hite sent the third draft of the Blue Book to persons on the solicitation list.

29. After June 3, 1999, Governor Owens made the following public appearances in which he urged the adoption of Referendum A:

- a. June 8, Colorado Counties, Inc. meeting in Vail, Colorado;
- b. June 24, Colorado Municipal League annual conference in Vail, Colorado;
- c. August 3, Metro North Chamber of Commerce meeting;
- d. August 4, RTD Board meeting;
- e. August 8, Metro North Chamber of Commerce meeting.

Governor Owens traveled to the Vail appearances without other staff, although some Office of the Governor staff members separately attended those sessions. Governor Owens did not request that Norton also attend the two Vail sessions, although Norton separately attended and participated in those programs.

30. After June 3, 1999, Norton continued his weekly meetings with Cal Marsella and others to discuss the current design stage of the "Southeast Corridor Project." Marsella's precise role was not a matter of record at the hearing. During some meetings, the participants discussed Referendum A's impact on the project. Norton also continued to meet with CDOT staff members, including Dugan, Perez, and Webster, to discuss the highway projects and the impact of Referendum A. On June 14, Norton, Dugan, Webster, and Perez met with Marsella to discuss "coordination with the Governor's office."

31. Norton also held regular meetings with the "Southeast Business Group" to discuss the private funding source for \$30 million as part of the overall funding package for the "Southeast Corridor Project." These meetings did not focus on Referendum A.

32. On August 2, Norton met with Dugan, Perez, Webster, and another individual to discuss coordination of responses to Open Records Act requests for information concerning Referendum A and the priority highway projects. The meeting was prompted by a request from the campaign organization promoting Referendum A for certain highway maps of the Southeast Corridor project.

33. On August 5, 1999, Norton met over lunch with Governor Owens and Walt Klein, the political consultant for the issue committee "Campaign to Pass Referendum A." Klein updated the governor and Norton on the status of the campaign. Klein bought the pizza at lunch. Norton spent about one and one-half hours in the meeting. He did not request any annual leave and simply made up the long lunch hour by working longer than the usual business day.

34. After June 3, 1999, Norton also made the following public appearances or presentations involving, at least in part, a discussion of Referendum A:

- a. June 8, Colorado Counties, Inc. meeting in Vail, Colorado;
- b. June 24, Colorado Municipal League annual conference in Vail, Colorado;
- c. June 28, Douglas County Commissioners meeting;
- d. June 29, Colorado Springs county offices and Powers Boulevard project;
- e. June 30, Lamar;
- f. July 6, Denver Mayor Webb's cabinet meeting;
- g. July 15, Durango Chamber of Commerce;
- h. July 16, Pachyderms at Pueblo, a Republican organization;
- i. July 26, tour of the Southeast Corridor Project with Gordon Linton, head of the Federal Transit Administration, and members of the press;
- j. August 4, Club 20 transportation committee meeting in Gunnison, with three members of the Transportation Commission;
- k. August 4, RTD Board meeting.

35. Norton traveled at state expense to these functions. Colorado Counties, Inc. may have paid some of Norton's expenses. Norton did not solicit any of these speaking appearances and made all of these appearances in response to requests from those organizations. Norton was requested to speak on the priority highway projects and the effect of Referendum A. Norton made no effort to present the criticisms of Referendum A, but he did not explicitly urge the audience to vote for Referendum A.

36. The public appearances to discuss funding of the highway projects were part of the normal job functions of the Executive Director of CDOT. In addition to presenting the information concerning implementation of Referendum A, Norton answered all questions posed to him. He did not solicit these questions.

37. The editor of the *Grand Junction Sentinel* requested that Norton write an article for that newspaper to describe the "pro" side of the debate on Referendum A to be published side-by-side with a "con" article written by Douglas Bruce. Norton wrote most of the article at home and the rest of the article in his office. A CDOT employee typed the article. Norton then proofread the article for about 15-20 minutes. The evidence did not establish the value of Norton's salaried time or the value of the time of the typist spent in drafting this article. State office equipment also was used, but the record evidence does not demonstrate the value of that use.

38. The "pro-con" articles were published in the July 25 edition of the newspaper. Norton's article describes reasons why Referendum A should be adopted. The article provides no criticism of Referendum A. Norton clearly intended to write an article which "advocated" Referendum A and the article reflected his opinions. Norton's article unmistakably advocates the adoption of Referendum A; however, at no point in the article does Norton actually urge voters to "approve", "vote for," "adopt," or take any other action to support Referendum A. The article concludes merely by encouraging the reader to study the facts. By contrast, Bruce's "con" article explicitly recommends the reader to "vote 'No' on Referendum A."

39. In July 1999, Norton wrote an article for the August issue of the CDOT newsletter. The article summarizes TRANS, briefly notes the effect on timing of some, but not all, highway construction projects, and notes the Governor's position on the referred measure. The article reminds CDOT employees that they cannot actively campaign on the issue on state time and notes that CDOT employees undoubtedly have a variety of opinions on TRANS. The article concludes by encouraging all CDOT employees to learn about the issues involved, make informed decisions, and participate in the November election. The article does not urge any reader to vote for or against Referendum A.

40. After June 3, 1999, Beasley participated in the following meetings that involved, at least in part, a discussion of Referendum A:

- a. June 8 and 9, Colorado Counties, Inc. meeting in Vail, Colorado;
- b. June 15, meeting with CDOT employees in order for Beasley to learn more about financing of the Southeast Corridor project and its relationship to the "7th Pot Projects;"
- c. June 22, tour of the Southeast Corridor Project;
- d. June 24 and 25, Colorado Municipal League annual conference in Vail, Colorado.

41. Beasley traveled at state expense to these meetings. At the June 8 and 9 meetings, Beasley attended several seminars and participated on a panel discussing "growth" that did not involve a discussion of Referendum A. Beasley attended the governor's keynote speech. The June 15 meeting with CDOT was not a public appearance. The meeting was educational for Beasley to enable him to answer questions about highway projects that he faces on a constant basis. At the June 24 and 25 Colorado Municipal League conference, Beasley attended seminars on "growth." Beasley also was approached by several state legislators and answered their questions about, among other topics, the impact of Referendum A. Beasley did not solicit any of the public appearances and did not solicit any of the questions posed to him in any of the public appearances. Beasley has responded to questions posed to him about any unfavorable reports regarding Referendum A. Since June 3, Beasley has not urged anyone to vote in favor of or against Referendum A.

42. On August 9, Larry Hudson, another member of the governors' office staff notified Beasley that Webster had discovered that the Democratic Caucus in the General Assembly criticized Referendum A as not "project specific." Webster informed the Democratic Communications Office that Referendum A was project specific about the 7th Pot. Hudson indicated to Beasley that Webster would contact Beasley about this. Presumably, in accordance with administration policy and practice, Webster then notified Beasley about this contact with the legislature.

43. After the passage of H.B. 99-1325, Witwer instructed the staff in the governor's policy office that the "Response Sheet" originally prepared in March should now be distributed only in response to questions. Witwer instructed staff to insert a footer on the document indicating such limitations on distribution. No record evidence exists indicating the Response Sheet was ever distributed after June 3. Since June 3,

Witwer has spent approximately two hours of her time in responding to the Blue Book drafts and approximately two hours in advising staff on compliance with the Fair Campaign Practices Act regarding Referendum A. Since June 3, Witwer has not urged anyone to vote in favor of or against Referendum A.

44. After June 2, 1999, Webster has made no public statements regarding Referendum A other than answering the June 3 interview questions and preparing the CDOT comments on the Blue Book. Webster attended the June 8 and 9 Colorado Counties, Inc. meeting and the June 24 and 25 Colorado Municipal League conference, as she does annually. Webster attended transportation panel discussions, but she did not participate on the panels. Webster answered any individual's questions placed to her about Referendum A. Since June 3, Webster has not urged anyone to vote in favor of or against Referendum A.

45. After the June 3 interview by the Office of Legislative Council, Dugan reviewed the CDOT comments on the first and second drafts of the Blue Book. Dugan has responded to phone call inquiries about the status of the 28 strategic projects. Dugan attended regular meetings with Marsella concerning intergovernmental involvement in the Southeast Corridor Project. The discussions concerned design issues. Referendum A was not discussed in those meetings. Since June 3, Dugan has not urged anyone to vote in favor of or against Referendum A.

46. After June 3, Perez participated in the review and comment on the Blue Book drafts and she participated in the meetings with other state employees. In August Perez left the employment of CDOT. Since June 3, Perez has not urged anyone to vote in favor of or against Referendum A.

DISCUSSION

At the hearing, Complainant cited Jefferson's Revolutionary-era writings to demonstrate abhorrence for taxpayer-funded support of or opposition to electoral issues. The principle that public funds cannot be used to support opposition to an initiated measure was recognized in *Mountain States Legal Foundation v. Denver School District*, 459 F.Supp. 357 (D.Colo. 1978). Use of public funds to support or oppose a measure referred by the General Assembly may be equally abhorrent to some constituents. The issues in this case, however, are far more narrowly defined than the political philosophy of Jefferson or even the debate between Jefferson and Hamilton over the role and powers of the new republic. The issues here are squarely grounded in the statutory provisions of the FCPA.

The complaint alleges that these respondents have violated section 1-45-117, C.R.S. of the FCPA which provides in pertinent part:

(1) (a) (I) 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:

... (C) Referred measure, as defined in section 1-1-104 (34.5).

"Contribution" is defined in relevant part in section 1-45-103(4)(a), C.R.S. to include a payment, loan, pledge, advance of money, guarantee of a loan, and fair market value of any gift or loan of property to an "issue committee" and any payment made to a third party for the benefit of an issue committee. "Expenditure" is defined in pertinent part in section 1-45-103(6), C.R.S. to include a payment, distribution, loan, or advance of any money by a person for the benefit of an issue committee. Referendum A became a "referred measure" on June 2, 1999. Consequently, on June 3, 1999, state agencies and employees were prohibited from spending any public moneys or making contributions to urge electors to vote in favor of or against Referendum A, with certain exceptions.

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The FCPA permits various exceptions to the general prohibition on using public moneys in the referendum election. A state agency or employee may respond to questions about an issue. [Section 1-45-117(1)(a)(II), C.R.S.]. A policy-making employee may spend up to \$50 in public moneys to express an opinion on an issue. [Section 1-45-117(1)(a)(II), C.R.S.]. A state agency may distribute a factual summary of arguments both for and against a proposal. [Section 1-45-117(1)(b)(I), C.R.S.]. An agency may pass a resolution or take a position of advocacy on an issue and report that resolution or position through normal means of distribution. [Section 1-45-117(1)(b)(III), C.R.S.]. An elected official may express a personal opinion on any issue. [Section 1-45-117(1)(b)(II), C.R.S.]. Further, Section 117(2) provides that expenses for an official residence, security officers, publicly owned motor vehicles and publicly owned aircraft are not covered as prohibited expenditures.

No violation

The record evidence does not demonstrate that these Respondents violated the provisions of the FCPA.

BLUE BOOK

The focus of the complaint is on allegedly impermissible involvement by CDOT and Office of the Governor staff in the Blue Book process. The Constitution of the State

of Colorado, Article V, sec. 1 (7.5)(a)(II), requires that the Blue Book be prepared. That section requires the research staff of the General Assembly to prepare a booklet containing a fair and impartial analysis of any referred measure. The constitution specifically provides: "Any person may file written comments for consideration by the research staff during the preparation of such analysis." The Blue Book is also statutorily mandated. Section 1-40-124.5, C.R.S. The statute requires distribution of the Blue Book to registered voters.

These Respondents did not violate section 1-45-117(1)(a)(I)(c), C.R.S. by submitting comments to the Office of Legislative Council. The only statutory prohibition of the FCPA is against spending public moneys or making contributions "to urge electors to vote in favor of or against" the referred measure. The complainant seemingly argues that the language of the statute bars actions of state employees involving Referendum A if the impact of their actions is to promote Referendum A. This reading of the act is far too broad. The statute addresses only expenditures or contributions of state moneys to urge voters to vote for Referendum A. The comments to the Office of Legislative Council were not even submitted to the voters. These respondents were not attempting to persuade any voter—they were merely suggesting that the Office of Legislative Council use certain text for the Blue Book. The Office of Legislative Council makes the determination on the wording of the Blue Book. That office may adopt or reject any of the comments submitted by the governor's office or CDOT. Because the respondents' comments were not made to the electorate, they did not violate the statutory prohibition.

Nevertheless, even if the statutory language "to urge electors to vote in favor of or against" encompassed indirect comments to the electorate, no violation of the statute exists in this case. The Blue Book process is constitutionally mandated and any person may submit comments. Construction of the statutory language to prohibit state agency employees from submitting comments to the General Assembly's research office would conflict with the state constitutional mandate allowing any person to file written comments. The statute must be construed to avoid constitutional infirmities. *Buckley v. Chilcutt*, 968 P.2d 112 (Colo. 1998); *See Meyer v. Putnam*, 186 Colo. 132, 134, 526 P.2d 139, 140 (1974).

Furthermore, all of the submissions by these Respondents to the Office of Legislative Council were responses to direct requests by that office. Section 1-45-117(1)(a)(II), C.R.S. expressly provides that an employee of a state agency may respond to questions about a referred measure if the employee has not solicited the question. CDOT's staff directly answered the questions of the Office of Legislative Council and Witwer and CDOT's staff directly responded to Hite's request for comments on the drafts. The additional exception allowing a state agency to distribute a factual

summary both for and against a measure [Section 1-45-117(1)(b)(I), C.R.S.] does not limit any of the other exceptions. Answers to questions do not have to be balanced both for and against.

Consequently, for all of these reasons, the "Blue Book" portion of the complaint is without merit as to all of the Respondents regardless of whether any state moneys were spent in the process. The remaining issue is whether the Respondents violated the FCPA by activities other than participating in the Blue Book process.

GOVERNOR OWENS

The FCPA creates at least three different classifications of affected state officials and employees: elected officials, policy-making employees, and other employees. Governor Owens, as an elected official, is permitted to express a personal opinion on the issue of approval of Referendum A. [Section 1-45-117(1)(b)(II), C.R.S.]. Policy-making officials may spend up to \$50 of public moneys incidental to expressing that official's opinion on Referendum A. [Section 1-45-117(1)(a)(II), C.R.S.]. The Complainant argues that the governor impermissibly spent more than \$50 in state moneys to express his opinion on Referendum A.

A public employee who has policy making responsibilities may expend no more than \$50 in public funds to express an opinion on an issue. [Section 1-45-117(1)(a)(II), C.R.S.]. The \$50 limit on public funds, however, cannot be applied so as to prevent Governor Owens from expressing his personal opinion to vote for Referendum A. [Section 1-45-117(1)(b)(II), C.R.S.]. Assuming that the \$50 limit applies to an elected official, Section 1-45-117(2), C.R.S. expressly excludes from all of the limitations of subsection (1): the governor's official residence, security officers, publicly owned motor vehicles, and publicly owned aircraft. The only significant expenses incurred by Governor Owens in this case have involved the costs of his travel by car or plane and his security officers, all expressly excluded from any of the limitations of the FCPA. Once these expense items are excluded, no other significant expenditures of state funds remain.

The time spent by Governor Owens is not an expenditure or contribution of public moneys. *In The Matter of the Complaint Filed By Dick Sargent Regarding Alleged Violations of the Fair Campaign Practices Act by Governor Roy Romer, and Jennifer Robles and Linda Wilz, as Employees of the Office of the Governor*, (Case No. OS-9714, Administrative Law Judge Marshall A. Snider, March 2, 1998); *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*, (Case No. OS-98-29, Administrative Law Judge Marshall A.

Snider, October 26, 1998). In *Sargent, supra*, the time spent by Governor Romer on Democratic National Committee activities, although a "thing of value," did not belong to the taxpayers of the State of Colorado. The governor is not required to devote 24 hours per day to the official activities of his office. The governor is entitled to, and expected to, spend time on personal and political matters, such as support of Referendum A. One cannot readily distinguish the governor's official versus political versus personal time. The critical legal distinction is between the governor expressing his opinion and the governor utilizing the coercive power of government to support a ballot issue. *Colorado Taxpayers Union, Inc. v. Romer*, 750 F.Supp. 1041 (D.Colo. 1990). The time spent by Governor Owens in support of Referendum A does not violate the FCPA.

The other alleged expenses incurred by Governor Owens in speaking in favor of Referendum A are also of no legal significance. Incidental or *de minimus* expenditures of staff time in assisting the governor to express his personal opinion in support of Referendum A do not violate the FCPA. *Sargent, supra*. Those staff employees making travel and speaking arrangements are performing their normal job functions. They earn the same salary whether making arrangements for Governor Owens to speak on highway funding or school violence. Similarly, higher level employees commonly meet with and advise the governor on a whole range of issues. It would be folly to hold that the governor may speak, but he may not ask for any information from his own legislative liaison or cabinet officials about Referendum A or may not have any staff person present in the event that he needs additional information about Referendum A. Of course, those other state employees, including even the Executive Director of CDOT and the governor's legislative liaison, are not free themselves to spend public moneys to speak for approval of Referendum A. The FCPA does not prohibit them in performing their own job duties from assisting the governor in so speaking.

Furthermore, the record evidence does not demonstrate the amounts of state personnel and travel resources that Governor Owens spent in urging voters to adopt Referendum A. In the absence of record evidence of expenditures in excess of \$50, no violation can be found. *Regents of University of Colorado v. Meyer*, 899 P.2d 316 (Colo. App. 1995).

Complainant further argues that Governor Owens is liable for any violations of the Fair Campaign Practices Act by any persons in the Office of the Governor or in CDOT. Complainant cites no authority for this proposition. The Act does not impose legal responsibility on the governor for all actions by state employees. At the very least, the Act would allow legal responsibility to be placed on the governor for the actions of others only if the governor directed or conspired with such other persons to violate the FCPA. No evidence of any such involvement by Governor Owens exists.

Consequently, the record evidence does not support finding any violation by Governor Owens of section 1-45-117(1)(a)(I), C.R.S.

NORTON

Norton is not an elected official, but as Executive Director of CDOT he is a policy-making employee. Although Norton has only an administrative function in carrying out the policy decisions of the Transportation Commission, the Executive Director of CDOT has policy-making functions for all of CDOT. [Section 43-1-105, C.R.S.]. Consequently, Norton is permitted to spend up to \$50 in public moneys to express his opinion that Referendum A should be approved. [Section 1-45-117(1)(b)(I), C.R.S.] Complainant alleges that Norton has spent more than \$50 in urging the electors to vote for Referendum A.

"Urge the electors"

No reported case has construed the phrase "urge electors to vote in favor of or against" in Section 1-45-117(1)(a)(I), C.R.S. or the predecessor statute. In construing the language of a statute, courts must ascertain and give effect to the intent of the General Assembly or the voters in enacting the statute. *Boatright v. Derr*, 919 P.2d 221, 224 (Colo. 1996); *Colorado Common Cause v. Meyer*, 758 P.2d 153, 160 (Colo. 1988). To determine such intent, courts should first look to the statutory language giving words and phrases their commonly understood meaning. *Colorado Common Cause*, 758 P.2d at 160.

The FCPA provision does not bar use of public resources to "discuss", "promote," or "explain the benefits of" a referred measure. The choice of the text is instructive. The issues in this case do not involve the First Amendment problems for "issue advocacy" presented by restrictions on "independent expenditures" on behalf of electoral candidates. Those First Amendment problems led to a "bright line test" of advocacy for a candidate. *Buckley v. Valeo*, 424 U.S. 42 (1976). Consequently, unless the communication expressly advocated election or defeat by use of words such as "vote for", "elect", or "support", the expenditure was not on behalf of the candidate and was constitutionally protected speech on a political issue. *But see, Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). Although not directly applicable to the FCPA regulation of expenditure of public moneys, these First Amendment cases support a construction of the FCPA that the reference to "urging the electors" requires that the communication make some reference to voting for or against the measure. Construction of the FCPA text that prohibits any public expenditures by state employees in the affected subject area even to discuss the impact of the proposal

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because it might have a tendency to persuade some voters either for or against the measure runs counter to the public's right to know about the impact of the proposal. The exceptions in the FCPA, even the authorization of a factual summary by an agency, is not implicated unless the public employee "urges a vote for or against."

Grand Junction Sentinel Article

Norton's article in the *Grand Junction Sentinel* clearly advocated passage of Referendum A, but the article never expressly urged a vote for Referendum A. The article concludes with an encouragement to the reader to study the facts. The discussion of all of the reasons for adopting Referendum A does not equate to "urging the electors" to vote for the measure. *no urging*

Even if the article as a whole urges the electors to vote for Referendum A, the record evidence does not establish a violation of the FCPA. The article caused some expenditure of state employee time, both Norton's and a typist's. State office equipment also was used, but the record evidence does not demonstrate the value of that use. The record evidence does not demonstrate the valuation of the typist time. Norton receives an annual salary and works many hours in excess of 40 per week, averaging 65 hours. He wrote most of the article at home and the rest of the article in the office. The record evidence does not permit determination of the value of Norton's salaried time spent on the article. No other public expense is at issue with regard to the article. Therefore, in the absence of record evidence of expenditures over \$50, no violation of the FCPA can be found. *Regents of University of Colorado v. Meyer, supra.*

Further, assuming that the public expense were over \$50, the article was written pursuant to request of the editor for a "pro" article to juxtapose with Bruce's "con" article. Section 1-45-117(1)(a)(II), C.R.S. permits response to a question. The import of the editor's question to Norton was "why support Referendum A?" Norton's article answers that question. There is absolutely no evidence that Norton solicited the request for the article.

CDOT Newsletters

The CDOT newsletter articles by Norton do not urge a vote in favor, although they explain and set forth reasons why one might want to vote in favor of the referendum. Furthermore, the newsletters would be published and distributed with the paychecks regardless of the existence of the Norton article. Consequently, the Norton articles did not cause any additional expenditure of public moneys for the publication. The record evidence again does not establish the valuation of Norton's salaried time or the value of the time of the typist in drafting the articles. Because the record evidence

does not establish expenditures of more than \$50, no violation of Section 1-45-117(1)(a)(I), C.R.S. can be found. *Regents of University of Colorado v. Meyer, supra.*

Meetings

The rest of the evidence about Norton's activities since June 3, 1999, does not demonstrate a single instance of Norton making a statement "urging the electors to vote for Referendum A." The speaking appearances by Norton in which he discussed Referendum A do not demonstrate that he urged adoption of the measure. An inference that Norton actually made a statement of advocacy at the Colorado Counties, Inc. or Colorado Municipal League meetings would be wholly improper. Norton's appearance to discuss the transportation projects before such constituents is neither surprising nor improper. The mere fact that Norton wrote or spoke about Referendum A is not objectionable. Indeed, it would be an oddity for the Executive Director of CDOT to ignore Referendum A in planning transportation projects that are already underway or in discussing the Department's operation in public meetings.

The meetings with other state employees do not involve statements urging the voters to adopt Referendum A. The meeting with the governor and Walt Klein, the political consultant for the issue committee "Campaign to Pass Referendum A," again did not involve a statement urging the voters to adopt the measure. Norton spent a long lunch hour at the meeting and no state funds were expended in the meeting. The meeting consisted of Klein updating the governor and Norton on the status of the campaign, information that Norton would likely need simply in performing his job as Executive Director of CDOT. Unless Norton performed some service or gave some state property to the issue committee during the meeting, no FCPA violation is implicated merely by the meeting. The record evidence discloses no such contribution or expenditure.

For these reasons, Norton did not violate Section 1-45-117(1)(a)(I), C.R.S.

REMAINING RESPONDENTS

The record contains no competent evidence of any violation of the FCPA by any of the remaining Respondents. Dugan, and Perez did nothing more than participate in the Blue Book process and meet with other employees concerning Referendum A and the highway construction projects. In addition to these same activities, after June 3, Webster had only one additional contact: a conversation with the Democratic Communications Office. Webster's communication with that office did not constitute an action urging the electors to vote for Referendum A. Witwer had no involvement with

Referendum A after June 3 outside the Blue Book process and advising the governor's office on compliance with FCPA.

Only Beasley, the governor's legislative liaison, has had any significant public contact on Referendum A. Beasley fields questions on the highway projects and Referendum A, as well as all other state issues, on a regular basis. The record evidence does not demonstrate a single example of Beasley urging an elector to vote for Referendum A. Beasley's attendance at public speeches made by the governor does not in any way constitute his expenditure or contribution of public moneys to urge a vote for Referendum A. While the complainant may not agree with the use of the time and resources of the Office of the Governor or of CDOT in analyzing Referendum A and assisting Governor Owens and Executive Director Norton in speaking about Referendum A, those activities do not constitute violations of the FCPA.

CONCLUSIONS OF LAW

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

2. Governor Bill Owens, Heather Witwer, Mike Beasley, Tom Norton, Heather Dugan, Carla Perez, and Jennifer Webster have not violated Section 1-45-117(1)(a)(I), C.R.S.

AGENCY DECISION

It is the Agency Decision of the Administrative Law Judge that the complaint of Douglas Bruce against these Respondents is dismissed.

August 31, 1999

Martin D. Stuber
Administrative Law Judge

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Certificate of Service

I hereby certify that true and correct copies of the above Agency Decision were deposited in the U.S. mail this _____ day of _____, 1999, addressed as follows:

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