

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 99-14

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AGENCY DECISION

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IN THE MATTER OF THE COMPLAINT FILED BY PATRICK AND SHELLEY CIPOLLA REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY RICHARD KASTENDIECK, SUPERINTENDENT, PARK SCHOOL DISTRICT and SARAH KASTENDIECK, TEACHER, PARK SCHOOL DISTRICT.

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On November 24, 1999, Complainants Patrick and Shelley Cipolla filed a complaint with the Colorado Secretary of State against Richard Kastendieck, Superintendent, Park School District and Sarah Kastendieck, teacher, Park School District, alleging violations of the Fair Campaign Practices Act, Sections 1-45-101-1-45-118, C.R.S. (1999) ("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. (1999) of the Act.

Hearing was held in this matter December 16, 1999. Complainants appeared and represented themselves. Richard and Sarah Kastendieck were represented by W. Stuart Stuller, Caplan and Earnest, LLC. The Administrative Law Judge issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (1999) and Section 24-4-105(14)(a), C.R.S. (1999).

At the conclusion of Complainants' case in chief, Respondents moved to dismiss this proceeding. This motion was granted pursuant to Rule 41(b), C.R.C.P., on the ground that based on the facts and the law Complainants had shown no violation of the Act and no right to relief. This Agency Decision constitutes the Administrative Law Judge's formal written ruling on Respondents' motion to dismiss.

#### ISSUE PRESENTED

The issue to be determined in this proceeding is whether Richard and/or Sarah Kastendieck violated the Act by expending public funds or making contributions in connection with alleged actions they took in the fall of 1999 which assertedly urged voters to vote in favor of a referred tax override measure concerning the Park School District which appeared on the November 2, 1999, ballot.

## PRELIMINARY MATTER

In a preliminary motion filed in this matter (a motion to remove counsel) Complainants clarified that the respondents in this proceeding were limited to Richard and Sarah Kastendieck; no complaint was directed against the Park School District or any other entity.

## STIPULATED FACTS

At the commencement of the hearing the parties stipulated to the following facts which the Administrative Law Judge enters as findings in this matter:

1. Park School District is a political subdivision within the meaning of Section 1-45-117(1)(a)(I), C.R.S. (1999) of the Act.
2. Respondent Dr. Richard Kastendieck is the Superintendent of the Park School District.
3. Respondent Sarah Kastendieck is a kindergarten teacher in the Park School District.
4. The Park School District's Board of Education certified to the office of the County Clerk and Recorder in Larimer County the ballot issue known as measure 3A.
5. Measure 3A is a referred measure within the meaning of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999) of the Act.
6. Measure 3A was supported by a group known as Partners for Quality Education ("PQE").
7. PQE paid for the production of flyers supporting measure 3A. Some of these flyers were sent home in "Friday packets" with Park School District elementary school children.
8. In the fall of 1999, Dr. Kastendieck spoke to a group of Park School District students in a government class and some members of the student council.
9. On October 26, 1999 at 11:24 a.m., Sarah Kastendieck sent an e-mail message to Park School District staff members, using the Park School District's e-mail system.

## ADDITIONAL FINDINGS OF FACT

Based upon the evidence presented at hearing, the Administrative Law Judge enters the following additional findings of fact:

10. Respondent Dr. Richard Kastendieck is the Superintendent of the Park School District R-3 ("the District"), which is located in Estes Park, Colorado.

11. Referred Issue 3A was a tax override measure to increase the mill levy for the District which appeared on the November 2, 1999 ballot of registered electors within the District. The measure was billed as a means of eliminating a projected shortfall in the District's budget.

12. Dr. Kastendieck was appointed election official for a Park School District School Board member election which apparently occurred some time in 1999 prior to the November 2, 1999 election. He was not an election official for the November 2, 1999 measure 3A election.

13. Potential shortfalls in the Park School District budget were first projected by the District in the spring of 1999. In August 1999, Dr. Kastendieck was directed by the District's Board of Education to obtain input from affected individuals, including District students, parents and staff, concerning budget priorities and suggested budget cuts in the event the budget shortfall materialized. Dr. Kastendieck was also instructed to be prepared to implement some budget cuts effective January 2000.

14. During the 1998-99 school year, a District decision not to include Martin Luther King, Jr. Day as an official school holiday had been met with student complaints that they had not been afforded sufficient input in District decision-making. As a result of this dispute the prior year, a special effort was made by Dr. Kastendieck and the District during the fall of 1999 to include students in decision-making concerning potential budget cuts.

15. In connection with the effort during the fall of 1999 to obtain student input concerning budget issues, students were asked by teachers to fill out a survey concerning their thoughts on possible budget cuts.

16. Dr. Kastendieck did not personally request students to complete the survey. However, he did speak to some government classes (in which there may have been students who were 18 years old and eligible to vote) concerning the budget shortfall issue. He also spoke to members of the student council about this matter and made himself available for questions from the students. In these presentations and conversations, Dr. Kastendieck limited his remarks to the budget issue. He did not speak to students about Referred Issue 3A and he did not urge the students to vote for or against Referred Measure 3A.

17. The District held a public town meeting at the District elementary school on September 30, 1999 to discuss budget issues and potential budget cuts. At that meeting a member of PQE announced that the group would be producing flyers and sending them home from school with school children.

18. In the fall of 1999 prior to November 2, Dr. Kastendieck spoke with District parents and others on one or more occasions concerning budget issues. The evidence failed to establish that Dr. Kastendieck discussed Referred Issue 3A on these occasions.

19. Dr. Kastendieck is a member of PQE.

20. PQE flyers urging a "yes" vote on Referred Issue 3A (without any arguments against the proposal) were sent home from District schools with elementary and middle school children during the fall of 1999.

21. The evidence failed to establish the precise organizational nature of PQE.

22. The evidence did not disclose the process by which the PQE flyers that went home with District students were produced or distributed to the students.

23. The evidence failed to establish that any public moneys were expended or contributed in connection with the production and/or distribution of PQE flyers that were sent home with District students.

24. The evidence failed to establish that opponents of Referred Measure 3A did not have equal access to the District's Friday packets or similar distribution procedures for the purpose of sending home with District students flyers in opposition to Referred Measure 3A. There was no evidence indicating that any opponent of Referred Measure 3A ever attempted to send home with students material in opposition to Referred Measure 3A.

25. The e-mail message that Sarah Kastendieck sent on October 26, 1999 to District staff members using the District's e-mail system consisted of a statement of Ms. Kastendieck's personal opinion concerning the response of the local teacher's union to impending budget cuts and Referred Issue 3A. The message indicated that in Ms. Kastendieck's opinion the local teacher's union should have been focusing on getting measure 3A passed, rather than concentrating on the loss of jobs that would result if the measure was not passed and the projected budget shortfall became a reality.

26. The evidence failed to establish that Ms. Kastendieck's e-mail was sent during work time, as opposed to her duty-free time during the day.

27. The evidence failed to establish that the District did not permit staff members to use the District's e-mail system during free time as a public forum to express personal points of view to the District's staff at large.

28. The evidence failed to establish that the use by Ms. Kastendieck of the District's existing e-mail system to send her October 26, 1999 e-mail message to District staff members cost the District any money above and beyond the District's cost for having the e-mail system in place.

29. The evidence failed to establish that the use by Ms. Kastendieck of the District's existing e-mail system to send her October 26, 1999 e-mail message to District staff members constituted the a contribution or expenditure of any public moneys by Ms. Kastendieck or otherwise.

### DISCUSSION

The Act prohibits political subdivisions of the state, such as the District, from expending any public moneys or making any contributions to urge electors to vote in favor or against certain referred measures. Section 1-45-117(1)(a)(I)(C), C.R.S. (1999). The District concedes that Referred Issue 3A was a referred measure covered by the Act. It was therefore a referred measure as defined in Section 1-1-104(34.5), C.R.S. (1999), as provided in Section 1-45-117(1)(a)(I)(C). Thus, the District is bound by the prohibitions of Section 1-45-117(1)(a)(I)(C) with respect to Referred Issue 3A.

Complainant maintains that the District, through Respondents, expended public moneys or made contributions to urge electors to vote in favor or against Referred Issue 3A, in violation of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999), in connection with three separate sets of circumstances: (1) the PQE flyers concerning Referred Issue 3 that were sent home with school children; (2) Dr. Kastendieck's discussions with students and/or other individuals relating to the budget shortfall issue; and (3) Ms. Kastendieck's October 26, 1999 e-mail message to District staff members. (Complainants also allege violations of Section 1-45-102, C.R.S. (1999) of the Act. However, this section of the Act is merely the legislative declaration; no violation of this Section is possible).

As set forth below, the Administrative Law Judge concludes that Complainants failed to meet their burden of proof with respect to any of these issues and therefore failed to establish any violation of the Act occurred.

**The PQE Flyers.** There is no dispute that the flyers in question do, in fact, urge electors to vote for the Referred Issue 3. However, there was no evidence to support Complainants' contention that any public moneys were expended or any contributions were made by a political subdivision in connection with those flyers.

Specifically, the evidence did not establish that the Respondents on behalf of the District made any payment, distribution, loan or advance of any money for the benefit of PQE or any candidate committee, political committee, issue committee or political party in relation to these flyers. Section 1-45-103(6), C.R.S. (1999) (definition of "expenditure"). There is also no evidence that Respondents on behalf of the District made any payment, loan, gift, pledge, or advance of money or guarantee of a loan or gave anything of value to PQE or any candidate committee, political committee, issue committee or political party in relation to these flyers. Section 1-45-103(4), C.R.S. (1999) (definition of "contribution"). In fact, the evidence failed to establish any School District involvement whatsoever in the production and distribution of the flyers. The record is also devoid of any evidence that any public funds were involved in any way in the production of the PQE flyers or in the process of distributing some of the flyers by sending them home with District school children.

Complainants assert that allowing the children to be a conduit for the flyers amounted to a contribution to PQE. The Administrative Law Judge disagrees. As indicated above, the definition of "contribution" under Section 1-45-103(4), C.R.S. (1999) of the Act clearly does not include the act of allowing school children to carry home PQE's flyer. Under the Act, a contribution is defined as a payment, loan, pledge or advance of money, or guarantee of a loan, the gift or loan of any property, or anything of value given to a candidate. Because allowing the students to carry home PQE flyers does not fall within the statutory definition of contribution, such action does not constitute a contribution within the meaning of the Act.

Thus, Complainants failed to establish any violation of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999) of the Act with respect to the PQE flyers.

**Dr. Kastendieck's discussions with students and others.** Although Complainant's assert that Dr. Kastendieck's discussions with students and others constituted the expenditure or contribution of public funds to urge electors to vote in favor of or against Referred Issue 3A, the evidence failed to support this assertion.

As was true with respect to the PQE flyers, the evidence failed to establish that any public funds were contributed or expended in connection with these conversations. For example, the evidence failed to establish whether these conversations took place during Dr. Kastendieck's regular work day or during his free time. Thus, there was no evidence as to whether any portion of Dr. Kastendieck's salary was involved during these discussions. Much more fundamentally, however, the evidence failed to establish that Dr. Kastendieck discussed Referred Issue 3A at all on these occasions and certainly failed to establish that Dr. Kastendieck ever urged his audiences (whether students or adults) to vote in favor or against Referred Issue 3a. Thus, no violation of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999) of the Act has been established with respect to these matters.

**Ms. Kastendieck's e-mail message of October 26, 1999.** Complainants assert that Ms. Kastendieck's e-mail message which she sent on the District e-mail system to District staff constituted the expenditure or contribution of public funds in violation of the Act. This argument is unconvincing.

The evidence concerning Ms. Kastendieck's e-mail merely established that the e-mail was sent to District staff. It did not establish that Ms. Kastendieck drafted or sent the e-mail on District time, as opposed to on her free time. Thus, there is no evidence indicating that Ms. Kastendieck spent District-paid time creating the e-mail. The evidence also failed to establish that the process of sending the e-mail to District employees on the District's existing e-mail system cost the District any money above and beyond the District's cost for having the e-mail system in place. Thus, the evidence failed to establish that any contribution or expenditure of public moneys occurred within the meaning of the Act in connection with the sending of the e-mail in question. Under these circumstances, no violation of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999) of the Act has been established with respect to this e-mail message.

In sum, the Administrative Law Judge concludes that Complainants have failed to meet their burden of establishing any violation of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999) of the Act occurred in connection with the matters alleged by Complainants.

### CONCLUSIONS OF LAW

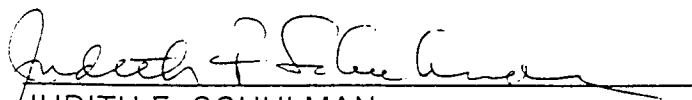
1. The Secretary of State and the Administrative Law Judge have jurisdiction over this complaint.
2. Complainants failed to establish any violation of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999) of the Act in connection with Referred Issue 3A.

### AGENCY DECISION

No violation of Section 1-45-117(1)(a)(I)(C), C.R.S. (1999) of the Fair Campaign Practices Act has been established by Complainants with respect Referred Issue 3A. Therefore, the complaint in this matter is dismissed.

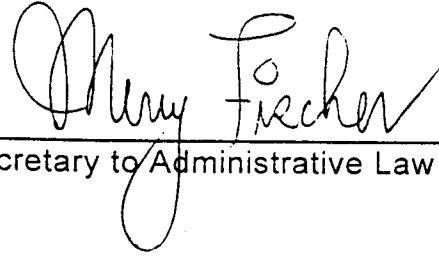
### **DONE AND SIGNED**

December 20, 1999

  
JUDITH F. SCHULMAN  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to: Patrick and Shelley Cipolla, 632 Aspen Avenue, Estes Park, CO 80517; W. Stuart Stuller, Caplan and Earnest, LLC, 3595 Canyon Blvd., Suite 400, Boulder, CO 80302-6737; and was served via inter-office mail on Donetta Davidson, Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on this 23<sup>RD</sup> day of December, 1999.



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Secretary to Administrative Law Judge

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