

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

CASE NO. OS 2000-8

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY DOUGLAS BRUCE REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT BY JAMES
MULLEN AND DOES I - X**

On September 11, 2000, Complainant Douglas Bruce filed a complaint with the Colorado Secretary of State against James Mullen and Does I - X. The complaint alleged that Mullen and unnamed persons had committed violations of the Fair Campaign Practices Act, Section 1-45-101 *et seq.*, C.R.S. (2000). 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. (2000).

The hearing in this matter was held in Denver, Colorado, on October 25, 2000, before Administrative Law Judge Marshall A. Snider. Douglas Bruce appeared without counsel. James Mullen was represented by Stephen K. Hook, Assistant City Attorney, Colorado Springs, Colorado. Does I - X were not identified and were not served with notice of this hearing. Accordingly, this hearing proceeded only against Mullen.

The Administrative Law Judge issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (2000) and Section 24-4-105 (14)(a), C.R.S. (2000).

STATEMENT OF THE ISSUE

The issue to be determined is whether James Mullen, as city manager of the City of Colorado Springs, Colorado, violated the Fair Campaign Practices Act when he mailed information regarding a proposed amendment to the Colorado Constitution to numerous individuals at public expense.

FINDINGS OF FACT

1. James Mullen ("Mullen") is the city manager of the City of Colorado Springs, Colorado. As city manager, Mullen is the chief executive officer of the city.

2. Colorado Springs has a council-manager form of government. Under this structure the city council of the City of Colorado Springs sets policy and Mullen and his subordinates execute that policy.

3. Amendment 21, also known as TaxCut 2000, is a proposed amendment to the Colorado Constitution. As of August 22, 2000, Amendment 21 was a state-wide ballot issue which had had a title designated and fixed pursuant to Section 1-40-106(1), C.R.S. (2000), which is the statutory provision for designating titles for proposed constitutional amendments. Amendment 21 is on the November 7, 2000, general election ballot in Colorado.

4. On August 22, 2000, the Colorado Springs City Council passed a resolution opposing Amendment 21 because, according to the resolution, passage of that amendment would reduce the city's revenues and adversely impact the city's ability to provide necessary municipal services and infrastructure.

5. The motion containing this resolution directed Mullen to publicize the passage of the resolution. The motion did not specify the method of publicizing the passage of the resolution. That method was left to Mullen's discretion.

6. Mullen mailed the resolution, along with a cover letter dated September 1, 2000, to approximately 200 people. The cover letter advised recipients of the passage of the resolution. The letter also stated that Amendment 21 would have a devastating effect on the ability of local governments to deliver services to their residents. The letter noted that Amendment 21 would decrease the city's revenues by 25% and would dramatically impact the quality of life in the Colorado Springs region.

7. Mullen also attached numerous documents to his September 1 letter. These attachments included material that the city council had available to it at the time it passed the resolution. In addition to the resolution itself, the letter included the following:

A. The text of Amendment 21 and a phrase-by-phrase and provision-by-provision analysis of the amendment.

B. An analysis of the estimated negative fiscal impact of Amendment 21 on the city of Colorado Springs.

C. A memorandum from the Colorado Municipal League, which attached a flyer from the "No on Amendment 21 Campaign" inviting individuals to a meeting on Amendment 21. The flyer from the "No on Amendment 21 Campaign" stated that the passage of Amendment 21 would cut funding for and dramatically cut the reliability of police and fire protection, healthcare, and ambulance, library, water, parks and recreation, education and transportation services to the public. The flyer included the directive to "Vote NO on Amendment 21".

D. A memorandum from the Division of Local Government, Colorado Counties, Inc. and the Colorado Municipal League describing a method for computing the tax cuts which would result if Amendment 21 passed.

E. A memorandum from a law firm on the effects of the Amendment 21 tax cuts.

8. Mullen's September 1, 2000, letter and attachments do not include a factual summary of Amendment 21, incorporating arguments for and against the proposal. In fact, Mullen's letter is critical of Amendment 21. The overall tenor of this mailing is that the Colorado Springs city council believes that Amendment 21 should not be adopted.

9. Mullen's September 1, 2000, letter and attachments were prepared, copied and mailed by the City of Colorado Springs at public expense.

10. The normal method of disseminating information regarding the results of meetings of the Colorado Springs city council is for the city to issue a press release. In addition, the city council routinely publicizes its agendas and minutes on the internet, as well as mailing the agenda and minutes to individuals who sign up for these mailings with the city clerk. City council meetings are also televised.

11. The city council and Mullen have the discretion to publicize the activities of the city council by means other than those described in Paragraph 10 of the Findings of Fact. However, the city council has no other established policy for disseminating information other than those set forth in Paragraph 10.

12. The 200 people to whom Mullen sent the September 1, 2000, letter and attachments are identified on a list maintained by the city's public communications office. This list contains the names of people who have frequently requested information on city council activities; people who have asked to be advised of city council activities; people who are associated with economic development activities; and members of various city boards and commissions. Some of the people on this list are considered community leaders in Colorado Springs.

13. Mullen made the decision to disseminate the resolution and attachments to the individuals on this list. Mullen routinely used this list to disseminate information regarding municipal events and city council activities. Mullen disseminates information to the mailing list in question on a discretionary, case-by-case basis.

14. The daily newspaper in Colorado Springs reported the passage of the city council's August 22, 2000, resolution on Amendment 21 prior to September 1, 2000.

15. After August 22, 2000, the Colorado Springs city council passed a resolution regarding its position on another proposed constitutional amendment on the November 7 ballot. The council did not direct Mullen to publicize its position on this ballot issue.

16. The population of the City of Colorado Springs is approximately 360,000 people.

DISCUSSION

I. THE NATURE OF THE COMPLAINT

The Fair Campaign Practices Act ("the Act") provides that no agency of the state or any political subdivision of the state shall expend any public moneys to urge electors to vote for or against certain election issues. Section 1-45-117(1)(a)(I), C.R.S. (2000). The City of Colorado Springs does not contest that it is a political subdivision of the state of Colorado and is subject to the Act.

This complaint in form is brought against Mullen, the city manager of Colorado Springs. The prohibitions of Section 117(1)(a)(I) of the Act run against public bodies, not against individuals. Nevertheless, complaints filed by citizens seeking to enforce the Act should not be held to the standards of formal legal pleadings.

In essence, this complaint is against the City of Colorado Springs. Mullen appears in this case in his role as an agent of the City of Colorado Springs, defending against a charge that through his actions the city violated the Act. Mullen's conduct in this case was taken at the direction of the city council, which is the policy-making body for the City of Colorado Springs. The City of Colorado Springs, through its city attorney, had notice of this proceeding and appeared and participated in this case through the city attorney's office. Therefore, this case will be treated as involving an allegation of a violation by the City of Colorado Springs of Section 117(1)(a)(I) of the Act.

II. DID THE CITY OF COLORADO SPRINGS EXPEND PUBLIC MONEYS TO URGE ELECTORS TO VOTE AGAINST AMENDMENT 21?

A. The Act prohibits a political subdivision of the state from expending any public moneys to urge electors to vote for or against certain election issues. One of the covered issues is a state-wide ballot issue that has had a title designated pursuant to Section 1-40-106(1), C.R.S. Section 117(1)(a)(I)(A), C.R.S. (2000). Amendment 21 is such a ballot issue (Findings of Fact, Paragraph 3).

The first issue to be determined is therefore whether Mullen's September 1, 2000, letter and attachments urged electors to vote against Amendment 21. Colorado Springs argues that the phrase "urge electors to vote in favor of or against" a ballot issue

should be interpreted to require an explicit directive to voters to vote "yes" or "no". This argument is based upon the interpretation of the Federal Election Campaign Act of 1971 established in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley v. Valeo* the Supreme Court concluded that the regulations contained in the Federal Election Campaign Act would violate First Amendment rights of free speech and association unless those regulations were narrowly construed to apply only to express advocacy. 424 U.S. at 43, 64, 66. See also *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986); *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946, 951 (W.D.Va. 1995). The Court in *Buckley* described examples of "express advocacy" as including language such as "vote for", "elect", "support", "cast your ballot for", "Smith for Congress", "vote against", "defeat" and "reject". 424 U.S. at 44, n. 52. This language established a "bright-line" test for determining when a political communication would constitute express advocacy. *Maine Right to Life Committee v. Federal Election Commission*, 914 F. Supp. 8 (D. Maine 1996), *aff'd* 98 F.3d 1 (1st Cir. 1996). Such a "bright-line" was considered necessary because of the difficulty inherent in distinguishing a discussion of political issues (which is protected by the First Amendment) from the exhortations to vote for or against a candidate. See *Federal Election Commission v. Massachusetts Citizens for Life*, *supra*; *Federal Election Commission v. Christian Action Network*, *supra*.

Subsequent to *Buckley v. Valeo* the federal courts have consistently held that campaign finance regulation can not constitutionally extend to discussions of issues, even if those discussions implicitly support or oppose a candidate, unless the communication expressly advocates the election or defeat of a clearly identified candidate. *Federal Election Commission v. Christian Action Network*, *supra* at 952. See, e.g., *Maine Right to Life Committee v. Federal Election Commission*, *supra*; *Faucher v. Federal Election Commission*, 928 P.2d 468 (1st Cir. 1991); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980); *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428 (D.D.C., 1989).

Colorado Springs agrees that the *Buckley v. Valeo* "bright-line" test is not constitutionally required in interpreting Section 117(1)(a)(I) of the Act. However, the city argues that the "bright-line" rationale should apply in interpreting the Act and that the city council did not violate the Act because it did not expressly advocate the defeat of Amendment 21. The Administrative Law Judge disagrees.

First, the material mailed by Mullen at public expense included a flyer from the "No on Amendment 21 Campaign" that included the exhortation to "Vote NO on Amendment 21". Thus, even under the *Buckley v. Valeo* test, this material, prepared and mailed at public expense, expressly advocated the defeat of Amendment 21.

More fundamentally, the rationale of *Buckley v. Valeo* and the other cases cited above does not apply to Section 117 of the Act. The rationale behind requiring express

advocacy before speech can be regulated is to ensure that government does not interfere with the exercise of first amendment rights by regulating the discussion of political issues that invariably arises during candidate elections. See *Federal Election Commission v. Massachusetts Citizens for Life*, *supra*; *Federal Election Commission v. Christian Action Network*, *supra*.

Section 117 of the Act, on the other hand, does not implicate first amendment rights in candidate elections. Rather, Section 117 establishes a policy that a public entity has no authority to expend public funds to advocate in favor of or against a ballot proposal, because citizens who take a contrary position are being taxed to pay for that advocacy. See *Mountain States Legal Foundation v. Denver School District No. 1*, 459 F. Supp. 357 (D. Colo. 1978). This policy would be eviscerated if a public entity could use public funds to disseminate information favorable or unfavorable to a ballot proposal, merely by avoiding the use of such express terms as "vote for" or "vote against".

This interpretation of the Act is supported by Section 117 (1)(b)(I) of the Act. That provision permits a public entity to dispense a factual summary concerning ballot issues, as long as the summary includes arguments both for and against the proposal and does not contain a conclusion in favor of or against the proposal. Therefore, a public body can provide balanced information that does not contain a conclusion in favor of or against the proposal. Section 117 (1)(b)(I). However, a public entity can not urge electors to vote for or against a proposal. Section 117(1)(a)(I).

A statute must be read as a whole to ascertain its intended purpose. *Kittinger v. City of Colorado Springs*, 872 P.2d 1265 (Colo. App. 1993). Considering Section 117(1)(a)(I) along with Section 117 (1)(b)(I), the statute prohibits a public body from dispensing information which is not balanced and which is unfavorable to or favorable to a ballot issue. Doing otherwise constitutes the "urging" of a vote one way or the other. Applying the "bright-line" test of *Buckley v. Valeo* to this statutory scheme would defeat this statutory purpose by allowing government agencies, at public expense, to disseminate information containing the argument on only one side of a ballot question. Because the *Buckley* analysis is not constitutionally required in the context of public expenditures, the Administrative Law Judge will not defeat the intent of Section 117 by adding the requirements of *Buckley* to that provision.

The Administrative Law Judge is aware that Section 117 has been interpreted to require an express urging of a vote by a public entity. In the Matter of the Complaint Filed by Douglas Bruce regarding Alleged Violations of the Fair Campaign Practices Act by Governor Bill Owens, et. al. (Administrative Law Judge Martin D. Stuber, August 31, 1999). However, for the reasons set forth above, the Administrative Law Judge declines to limit Section 117 in that fashion under the facts of the present case.

B. The material contained in Mullen's September 1, 2000, letter and attachments urged voters to defeat Amendment 21. As noted above, one of the attachments did so explicitly. In addition, the material as a whole provided negative information regarding the proposal. Mullen's September 1, 2000, letter is critical of Amendment 21. The overall tenor of this mailing is that the Colorado Springs city council believes that Amendment 21 must be defeated in order for local government to continue to provide necessary services.

Implicit in this mailing is the clear message that Amendment 21 will have negative consequences to citizens and that they therefore ought to defeat it. Even in the absence of an express directive to vote against the proposal, this material urges a "no" vote on Amendment 21. Therefore, the dissemination of this material at public expense violates Section 117(1)(a)(I).

III. REPORTING PASSAGE OF THE RESOLUTION

Section 117 of the Act contains certain exceptions to the general prohibition against the expenditure of public funds to urge electors to vote for or against a ballot issue. A public body can pass a resolution or take a position of advocacy on a ballot issue. Section 1-45-117(1)(b)(III)(A), C.R.S. (2000). In addition, a public entity may report the passage of or distribute such a resolution through established, customary means by which information about other proceedings of the entity is regularly provided to the public. Section 1-45-117(1)(b)(III)(B), C.R.S. (2000).

Colorado Springs argues that the mailing of the September 1, 2000, letter and attachments falls within this statutory exception and therefore did not violate the Act. The Administrative Law Judge disagrees with this argument for two reasons.

First, Section 117(1)(b)(III)(B) permits reporting passage of the resolution and distributing the resolution. Mullen's mailing went beyond merely reporting the city council resolution or distributing it. This mailing attached numerous supporting documents, including campaign literature of a group opposed to Amendment 21 that expressly advocated a "no" vote on the amendment. Therefore, the September 1 mailing does not qualify for this exception to Section 117.

Further, the mailing was not distributed through established, customary means by which information regarding the activities of the city council is regularly provided to the public. The normal method of disseminating information regarding the results of meetings of the Colorado Springs city council is through press releases, the internet, the mailing list kept by the city clerk, and televised city council meetings. The September 1 letter was not disseminated through these customary and established means. Rather, in this case the council directed Mullen to disseminate information regarding the resolution and Mullen exercised his discretion to send the September 1 letter to a select group of individuals who

are not part of the customary distribution mechanism. This group receives information from Mullen when Mullen or the city council chooses to send a mailing to this group. For example the city council did not direct that a separate mailing go out on another ballot proposal on which the council took a position (Findings of Fact, Paragraph 15). Because Mullen disseminates information to the mailing list in question on a discretionary and case-by-case basis, mailing to that list does not constitute a customary means by which information is regularly provided to the public.

Finally, the September 1 letter was mailed to a group of approximately 200 people who do not always receive a separate mailing on city council activities. This limited number of individuals does not constitute "the public". Words in a statute are to be given their plain and ordinary meaning. *Colorado Common Cause v. Meyer*, 758 P.2d 153 (Colo. 1988). "The public" means the general body of a community. Webster's New Twentieth Century Dictionary, 2d ed. (1983). The list of recipients of the September 1 letter was selective in its membership and included individuals who expressed an interest in council activities or who were associated with the business of the city. A mailing to the people on this list therefore does not constitute a dissemination of information to "the public", as that term is used in Section 117(1)(b)(III)(B).

The Administrative Law Judge therefore concludes that the September 1 mailing was not permitted under Section 117(1)(b)(III) of the Act. Mullen's mailing went beyond the reporting of the passage of the resolution or distribution of the resolution, but included additional information designed to cast Amendment 21 in an unfavorable light. In addition, the resolution and attached information was distributed by means other than the customary means by which information about city council activities is regularly provided to the public.

CONCLUSIONS OF LAW

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

2. The City of Colorado Springs, through its chief executive officer Mullen, has violated Section 117(1)(a)(I), C.R.S. (2000) by expending public money to urge electors to vote against a state-wide ballot proposal.

AGENCY DECISION

Once a violation of the Act has been established, the Administrative Law Judge must include in the Agency Decision the appropriate order, sanction or relief authorized by the Act. Section 1-45-111 (2)(a), C.R.S. (2000). However, the Act does not provide for any sanctions that can be imposed by an administrative law judge for a violation of Section 117.

Section 113 of the Act identifies sanctions for various violations of the Act. None of these sanctions are appropriate in this case. Section 113(1) provides that a willful or intentional violation of Section 117 is a class two misdemeanor. However, an administrative law judge has no authority to determine criminal violations.

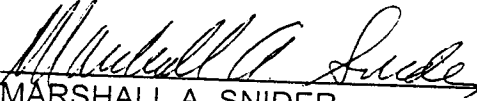
Section 113(2) establishes a civil penalty for violations of the Act relating to contribution limits. Contribution limits are governed by Section 105.3 of the Act. The present case does not involve an allegation of violations of the contribution limits of Section 105.3.

Section 113(4) permits the imposition of a penalty for failing to file required information or reports under the Act. The present case does not involve the violation of any filing requirements.

The Administrative Law Judge notes that under the law prior to its 2000 amendments an administrative law judge had the authority to recommend reporting of violations of the Act to the attorney general or a district attorney. See Section 1-45-111(2)(a), C.R.S. (1999). That provision of the Act was eliminated by the General Assembly in the 2000 amendments to the Act. 2000 Sess. Laws, pp. 126 -27, section 8.

Accordingly, the Act provides no sanction for a violation of Section 117 by a governmental agency. The Administrative Law Judge can issue no penalty beyond concluding that the City of Colorado Springs, through the Respondent Mullen, has violated the Act.

Dated: October 31, 2000.


MARSHALL A. SNIDER
Administrative Law Judge

CERTIFICATE OF MAILING

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:

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Secretary to Administrative Law Judge

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