

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

CASE NO. OS 2000-1

AGENCY DECISION GRANTING RESPONDENT'S RENEWED MOTION TO DISMISS

IN THE MATTER OF THE COMPLAINT FILED BY CHERYL ST. JOHN, DANIEL M. HAYES AND ROBERT B. PROKOP REGARDING ALLEGED VIOLATIONS OF FAIR CAMPAIGN PRACTICES ACT BY THE ARVADA CITY COUNCIL

On January 25, 2000, Complainants Cheryl St. John, Daniel M. Hayes, and Robert B. Prokop filed a complaint with the Colorado Secretary of State against Respondent Arvada City Council (Arvada), alleging violations of the Fair Campaign Practices Act (FCPA), Sections 1-45-101, *et seq.*, C.R.S. (2000). The Secretary of State transmitted the complaint to the Colorado Division of Administrative Hearings (DOAH) to conduct a hearing pursuant to Section 1-45-111(2)(a), C.R.S. (2000), of the FCPA.

Hearing in this matter commenced before Administrative Law Judge Margot Jones on February 10, 2000. Administrative Law Judge Jones heard preliminary argument, issued a briefing schedule for motions for summary judgment, and continued the hearing. On July 3, 2000, Administrative Law Judge Jones denied the parties' respective motions for summary judgment because she found disputed issues of fact.

DOAH docketed the continued hearing in this matter for September 18, 2000, before Administrative Law Judge Michael Harr (ALJ). On September 8, 2000, respondent filed a Renewed Motion to Dismiss. On September 12, 2000, complainants filed a Motion to Reinstate Previous Judge. The ALJ denied complainants' Motion to Reinstate Previous Judge on September 15, 2000.

The ALJ commenced further hearing in this matter on September 18, 2000. Complainants were represented by Alison Maynard, Esq. Respondent was represented by Christopher K. Daly, Esq., of the City of Arvada, Office of the City Attorney, by Mark G. Grueskin, Esq., and by Lisa D. Levinson, Esq. The ALJ heard argument on respondent's Motion in Limine and on respondent's Renewed Motion to Dismiss. Both motions raised jurisdictional issues which persuaded the ALJ to dismiss complainants' complaint for failure to state a claim for relief under the FCPA.

ISSUE PRESENTED

Does complainants' complaint state a claim upon which relief may be granted under the FCPA?

DISCUSSION

A. Background Facts:

Complainants' complaint arises out of a municipal election conducted by the City of Arvada on November 2, 1999. Complainants attached a copy of Arvada's Notice of Election to their complaint. The electorate had the opportunity to vote on candidates, ballot issues, and questions Arvada placed on the ballot.

Arvada placed "Issue 200 - Initiated Charter Amendment" and "Question 2A - Arvada Advisory Question" on the ballot. Question 2A is a non-binding advisory question which characterizes Issue 200 as "the initiated charter amendment concerning the restriction of building permits". Question 2A directly refers to legal liability costs Arvada anticipated it would incur if the electorate approved Issue 200. Question 2A asks the electorate how it preferred for Arvada to pay for such costs should voters approve Issue 200.

B. Failure to state a claim for relief under the FCPA:

Complainants' complaint involves Arvada's placement of Question 2A on the ballot. Arvada argues complainants fail to state a claim for relief under the FCPA because the underlying complaint fails to allege that Question 2A urges voters to vote in favor of or against Issue 200. The ALJ agrees.

Courts must consider only those matters stated within the four corners of the complaint when passing on a motion to dismiss for failure to state a claim. *Dillinger v. North Sterling Irrigation Dist.*, 135 Colo. 100, 3008 P.2d 608 (1957). Such motions must be decided based solely upon allegations stated in the complaint. *Foster Lumber Co. v. Weston Constructors, Inc.*, 33 Colo.App. 436, 521 P.2d 1294 (1974). The court must accept the facts in the complaint as true and determine whether there is relief under any theory of law. *Schlitters v. State*, 787 P.2d 656 (Colo. App. 1989).

The FCPA, at Section 1-45-117(1)(a)(I)(B), C.R.S. (2000), provides:

No agency, department, board, division, bureau, commission, or council of the state or any political subdivisions thereof shall ... expend any public moneys from any source ... **to urge electors to vote in favor of or against** any:

(B) Local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section

(Emphasis added).

Here, complainants allege Arvada improperly influenced the outcome of Issue 200 by placing Question 2A on the same ballot election. Complainants contend Arvada misrepresented anticipated costs and tax benefits of Issue 200 to taxpayers and that Arvada abused its authority and violated open meetings laws in placing Question 2A on the ballot. In their seventh paragraph, complainants allege:

Referendum 2A is nothing more than a political campaign disguised as a ballot proposal intended to undermine Issue 200. No legitimate city matter is proposed or decided upon in 2A. Instead, voters are intimidated with significant new taxes based on unsubstantiated, biased claims.

Even assuming Arvada misrepresented anticipated litigation costs and the need for significant new taxes in Question 2A, complainants' complaint nonetheless fails to allege Question 2A urges voters to vote in favor of or against Issue 200. The ALJ thus finds complainants' complaint fails to state a claim upon which relief may be granted under the FCPA.

Arvada argues the General Assembly has provided complainants another forum to attack the content of Question 2A, which is contained in Sections 31-10-1308 and 1-11-203.5, C.R.S. (2000). The ALJ lacks jurisdiction under either of those provisions to hear complainants' allegations attacking the content of Question 2A. The ALJ therefore concludes complainants' complaint under the FCPA should be denied and dismissed.

CONCLUSIONS OF LAW

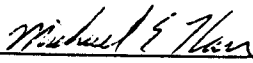
1. The Secretary of State and the ALJ have jurisdiction over the subject matter of this proceeding.

2. Complainants' complaint fails to state a claim upon which relief may be granted under the FCPA.

AGENCY DECISION

Because complainants' complaint fails to state a claim upon which relief may be granted under the FCPA, it is the Agency Decision of the ALJ that this action be dismissed.

DONE AND SIGNED this 20th day of September, 2000.



MICHAEL E. HARR,
Administrative Law Judge

CERTIFICATE OF SERVICE

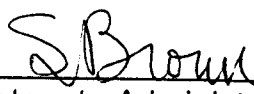
I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid at Denver, Colorado, this ~~20~~ day of September, 2000, addressed to:

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Secretary to Administrative Law Judge