

duplicate

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

CASE NO. OS 2001002

AGENCY DECISION

**COLORADO COMMON CAUSE, a registered not-for-profit corporation, and PETE
MAYSMITH, Executive Director of Colorado Common Cause,**

Complainants,

v.

**MIKE COFFMAN, STATE TREASURER FOR THE STATE OF COLORADO, and THE
COLORADO STATE TREASURER'S OFFICE,**

Respondents.

This case is a proceeding pursuant to the Fair Campaign Practices Act ("FCPA"), Section 1-45-101, C.R.S. *et seq.* A hearing in this matter was held before Administrative Law Judge ("ALJ") Matthew E. Norwood on June 5, 2001. Richard J. Gleason, Esq. represented the Complainants. The Respondents (either the "Treasurer" or "Coffman" or the "Treasury Department") were represented by Terry M. Fox, Assistant Attorney General and Maurice Knaizer, Deputy Attorney General. The ALJ issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S.

PRELIMINARY MATTERS

The Motions for Summary Judgment

This case concerns the Treasurer's issuance, through the Treasury Department, of three press releases as well as other information critical of the proposed Amendment 23, the school funding initiative, on the November 2000 state-wide ballot. The issue is whether this action by the Treasurer and the Treasury Department violated the prohibition set out in Section 1-45-117(1)(a)(I), C.R.S. of the FCPA against state expenditures of public moneys to urge electors to vote against any state-wide ballot issue.

On May 7, 2001, the ALJ issued an Order Granting in Part and Denying in Part Complainants' Motion for Summary Judgment and Order Denying Respondent's Motion for Summary Judgment. The motions for summary judgment ruled on in that Order both concerned a set of stipulated facts set out in a case management order drafted by the parties and adopted by the ALJ on April 12, 2001. In the case management order, the parties agreed that the issues in the case were:

1. Whether Treasurer Mike Coffman was authorized – constitutionally, statutorily or by the common law - to use state resources, in part through the use of e-mails, faxes, web postings and press releases, to express an opinion regarding Amendment 23, and, therefore whether the Treasurer and his staff were allowed to generate and disseminate the statements at issue, such that there was no violation of Section 117 of the Colorado Fair Campaign Practices Act, Section 1-45-117, C.R.S. (2000)?

2. If Treasurer Mike Coffman was not so authorized, did his actions constitute a violation of Section 117 of the Fair Campaign Practices Act, or were his actions nevertheless exempt pursuant to Section 1-45-117(1)(a)(II), C.R.S. (2000)?

The ALJ denied the Treasurer's Motion for Summary Judgment. The Complainants' motion for summary judgment concerned only the first of the two issues. The ALJ granted the Complainants' motion as to this issue. Specifically, the ALJ found that there is no *independent* authority for the Treasurer to issue the press releases and other statements at issue. The ALJ left open two possible exceptions for the Treasurer to the prohibition against spending state money to urge voters to vote against a state-wide ballot issue. First is the "fifty-dollar exception" found in Section 1-45-117(1)(a)(II), C.R.S. Second is the "resolution exception" of Section 1-45-117(1)(b)(III)(B), C.R.S.

The Lisa Weil Issue

On May 21, 2001, the Treasurer filed "Respondent's Motion in Limine to Exclude the Testimony of Lisa Weil and for Immediate Ruling on Said Motion." Weil was listed as a witness for the Complainants in the proposed case management order filed in this case. The Complainants opposed the motion. The ALJ denied the motion on May 23, 2001.

Then on June 4, 2001, the Treasurer filed another motion renewing his motion in limine to exclude the testimony of Lisa Weil. At the outset of the hearing, the Complainants agreed that they would not call Lisa Weil as a witness. Therefore, this issue is moot.

The Caption

Formerly, the caption of this case was, in part: "In re the matter of alleged violations of the Fair Campaign Practices Act by the Office of the State Treasurer, Mike Coffman, Treasurer, and its Staff Members." The Treasurer has objected to the inclusion of the Treasurer's staff members in the caption. He states through counsel that no staff member has been sued individually in this matter.

Paragraphs 4 and 5 of the Complaint in this matter identify as parties: Mike Coffman and the Colorado State Treasurer's Office. The Treasurer admitted these individuals to be parties in his answer. Also, the Treasurer has not argued improper

service. Consequently, the caption above will reflect the parties as described in the Complaint.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the ALJ finds as fact:

1. Amendment 23 was a state-wide ballot issue as described in Section 1-45-117(1)(a)(I)(A), C.R.S. on the November 2000 ballot. Amendment 23 proposed to increase funding for public education by at least the rate of inflation plus one percentage point for fiscal years 2001-02 through 2010-11 and annually by at least the rate of inflation for fiscal years thereafter. The Amendment also proposed to create a state education fund that was not subject to the "TABOR" limitation on fiscal year spending set out in article X, sec. 20 of the Colorado Constitution. The voters approved amendment 23.

2. The three press releases in this case were issued by the Treasury Department on September 7, 2000, October 17, 2000 and October 25, 2000, prior to election day. They are attached to this Agency Decision as exhibits A, B and C and are incorporated into these Findings of Fact as if fully set forth. They were issued on the instruction of the Treasurer. Each press release urged voters, either explicitly or by argument, to vote against Amendment 23.

3. The administrative section of the Treasury Department consists of the State Treasurer, Mike Coffman; Deputy Treasurer, Benson Stein; Executive Assistant to the State Treasurer, Steven Roalstad and a receptionist. The administrative section does not use research memoranda to communicate internally.

4. Roalstad was the Executive Assistant to the State Treasurer from June of 1999 to January of 2001. His duties consisted of administrative support, meeting coordination, responding to media inquiries and coordinating media events. Roalstad has a background in journalism and public relations. He had no policy-making authority. He received work assignments from Stein. During the fall of 2000, Roalstad earned \$40,000 per year as an Executive Assistant. He worked an average of 50 hours per week.

5. Sometime in late August of 2000, Roalstad, Stein and Coffman attended a meeting with the Colorado Office of State Planning and Budgeting ("OSPB") to discuss the proposed Amendment 23. At the meeting, OSPB provided a memorandum setting forth the anticipated fiscal impact of Amendment 23.

6. After the meeting, Stein asked Roalstad to prepare the September 7 press release, exhibit A. Roalstad did so, taking an hour to complete the task. The press release went through several drafts before it was released. Stein reviewed the drafts and made changes. The title of the press release is: "Coffman: Amendment 23 a Fiscal 'Train Wreck.'"

7. Roalstad repeated this same process for the creation of the October 17, 2000 press release, exhibit B. Again, he acted on instructions from Stein. Again, he took an hour to complete the press release. Again, the press release was reviewed by Stein prior to release.

8. This press release characterized Amendment 23 as "technically flawed." Amendment 23 was to become effective January 1, 2001. Because the state government uses a fiscal year starting July 1, the press release stated, the state would have to "slash" the state's capital construction budgets by more than \$155 million over the next five years. The press release concluded with a quote from Coffman: "This carelessly written amendment is so deeply flawed that I urge Colorado's voters to turn it down."

9. Stein determined to write the second press release, exhibit B, after receiving a second memorandum from OSPB that set out the potential problem of the Amendment's January 1, 2001 effective date and the July 1 start of the fiscal year.

10. Stein instructed Roalstad to prepare the third press release, exhibit C, because Coffman believed that the proponents of Amendment 23 were mischaracterizing the amendment. Also, Coffman believed the "blue book" mischaracterized the Amendment's impact. The blue book is a publication sent to all registered voters in the state. It provides a summary of the arguments for and against state-wide ballot measures. Roalstad spent one hour to prepare this third press release.

11. Exhibit C likened the Colorado legislators to drunken sailors on spending sprees. Exhibit C goes on to state:

[W]hen an economic downturn occurs the State Education Fund, like a sailor's wallet on the morning after, probably will not have the money the proponents claim to have set aside to meet the inflation plus one percent obligation.

...

Finally, Coffman urged voters to turn down Amendment 23 simply because of its complexities.

Express

12. Roalstad placed the text of each of the three press releases on the Treasury Department's web site. Roalstad spent ten minutes to do this. However, he did this in connection with other web page duties. The evidence does not disclose how much of this time was related to the press releases themselves.

13. In addition to placing the text of the press releases on the web site, Roalstad also reformatted the press releases so that they could be sent as e-mail messages or "Treasur-E-Notes." The Treasur-E-Notes were sent to a list of e-mail addresses maintained by the Treasury Department. Roalstad took ten minutes to format each press release into a Treasur-E-Note.

14. Sometime in late September, Roalstad also placed a copy of a newspaper editorial on the Treasury Department's web site. The editorial was a September 20, 2000 editorial in the Denver Post by Al Knight. The editorial was strongly critical of Amendment 23 and approved of Coffman's characterization of the Amendment as a "fiscal train wreck." It took Roalstad ten minutes to retype the editorial and place it on the Treasury Department web site.

15. In response to a complaint to the Treasury Department from an Ellen Marshall, Roalstad spent an additional five minutes removing the editorial from the web site.

16. Stein has been the Deputy Treasurer since January of 1999. His duties are to assist the Treasurer. He does not have policy-making authority. As Deputy Treasurer, Stein earns \$75,000 per year plus benefits. During the fall of 2000, he worked an average of 65 hours per week.

17. Stein worked two hours on each of the three press releases prior to their release. Stein used the press releases and drafts of the press releases as a method to communicate with Coffman concerning Amendment 23. Stein did not prepare any other document other than the three press releases to discuss Amendment 23 with Coffman. Stein spent ten minutes reviewing each of the three Treasur-E-Notes prior to their release.

18. Mike Coffman is the Treasurer of the State of Colorado, one of five state-wide elected officials. He is the sole policy-making official for the Treasury Department. He willfully and intentionally made the final decision to issue the press releases, Treasur-E-Notes, and faxes at issue in this case. He issues press releases to inform the public on topics he feels are important. He regards this as his duty as a public official.

19. The preparation of the press releases in this case educated the Treasurer and his staff concerning Amendment 23. As to how much the press releases went to education of himself and his staff and how much went to informing the public, the Treasurer is not able to allocate a percentage. On occasion, the Treasury Department prepares press releases but does not release them.

20. The Treasurer did not make a resolution opposing Amendment 23. No vote was taken at the Treasury Department in the nature of a resolution opposing Amendment 23. The Treasurer did not issue any written document titled "resolution" opposing Amendment 23. The Treasurer views all three press releases as resolutions in that they were statements of his position.

21. The Treasury Department spent \$11 for fax transmissions of the press releases. The Treasury Department spent \$6 for copying of the press releases.

CONCLUSIONS OF LAW

Based on the above Findings of Fact, the ALJ makes the following Conclusions of Law.

A. The Fifty-Dollar Exception.

1. The general prohibition to the expenditure of public funds to oppose a state-wide ballot issue and the fifty dollar exception are found at Section 1-45-117(1)(a)(I) and (II), C.R.S. In pertinent part, those subsections read:

1-45-117. State and political subdivisions - limitations on contributions. (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:

(A) State-wide ballot issue . . .

. . .

(II) . . . A member or employee of any such agency, department, board, division, bureau, commission, or council who has policy-making responsibilities may expend not more than fifty dollars of public moneys in the form of letters, telephone calls, or other activities incidental to expressing his or her opinion on any such issue described in subparagraph (I) of this paragraph (a).

2. The evidence in this case establishes that the Treasurer spent in excess of \$50 of public moneys to oppose Amendment 23, a state-wide ballot issue.

The evidence shows and the Treasury Department concedes that it spent \$17 on copying and faxes of the press releases.

Roalstad's annual salary of \$40,000 divided by 52 weeks equals \$769. With a 50-hour week, this results in an hourly rate of \$15.38 an hour. Roalstad spent an hour on each press release for a total of three hours. He spent ten minutes creating each Treasur-E-Note for a total of 30 minutes. Roalstad spent an additional ten minutes retyping the Al Knight column for placement on the web-site. Fifteen dollars and 38 cents multiplied by three hours and forty minutes (3.66) equals \$56.29.

The ALJ finds that the time spent *removing* the Al Knight column from the web-site should not be counted against the Treasurer, as this action did not go to urging electors to vote against Amendment 23.

Also, the ten minutes spent posting part of the contents of each press release on the web-site was done in connection with other web page duties. The evidence does not disclose how much of this time was related to the press releases themselves, and so this amount of time should not be counted against the Treasurer.

Stein's time breaks down as follows. An annual salary of \$75,000 divided by 52 weeks equal \$1442 per week. A 65-hour work week produces a figure of \$22.18 an hour. Stein worked two hours on each of the three press releases and ten minutes on each of the Treasur-E-Notes for a total time of six and one half hours. This is an expenditure of state money of \$144.17. Stein's time, Roalstad's time and the \$17 of expenses totals \$217.46: an amount in excess of \$50 by \$167.46.

3. Complainants have the burden of proof in this case as set out in Section 1-45-111(2)(a), C.R.S. The Treasurer argues that Complainants have failed to carry their burden, as they have not shown what portion of the above totals should be apportioned to internal communication in the administrative section of the Treasury Department. The administrative section of the Treasury Department does not use internal memoranda and the press releases were used to communicate within the administrative section. Therefore, according to this argument, a portion of the time spent on the press releases should be regarded as exempt from calculation. Continuing this argument, because the Complainants have not established what this portion is, they have failed to carry their burden of proof. This argument is not convincing.

The true nature of exhibits A, B and C is not that of internal government memoranda. Rather, they were used to communicate Coffman's views to the public. The exhibits do not purport to even handedly analyze the issues. Instead, they advocate a particular position. Exhibits B and C explicitly urge voters to turn down Amendment 23. They are titled "news releases." They are written in the format of newspaper editorials. Roalstad, the original author of the press releases, has a background in journalism and public relations. The press releases contain vivid statements attributed to Coffman such as the "drunken sailors" analogy in exhibit C. Such statements serve no purpose as internal Treasury Department analysis. Rather, they are colorful advocacy urging the defeat of Amendment 23.

Any time a state agency prepares a press release there will be an ancillary effect of informing and educating some agency personnel. But this effect does not permit the expenditure of public money to oppose state-wide ballot issues. To hold otherwise would allow government officials to end-run the FCPA. There would be no limit to the amount of so called "internal-memoranda" that could be prepared and disseminated at government expense to support or oppose candidates or ballot issues.

That Treasury Department officials learned and communicated about Amendment 23 in preparing the press releases does not provide a defense in this case. All time spent by Roalstad and Stein to prepare, review and disseminate the press releases properly should be charged against the \$50 limit.

B. The Resolution Exception

The activities of the Treasurer or the Treasury Department in this case do not meet the "resolution exception." This exception appears at Section 1-45-117(1)(a)(III)(B), C.R.S. That provision reads:

(III) Nothing in this subsection (1) shall be construed as prohibiting an agency, department, board, division, bureau,

commission, or council of the state or any political subdivision thereof from:

(A) Passing a resolution or taking a position of advocacy on any issue described in subparagraph (I) of paragraph (a) of this subsection (1); or

(B) Reporting the passage of or distributing such resolution through established, customary means, other than paid advertising, by which information about other proceedings of such agency, department, board, division, bureau, or council of the state or any political subdivision thereof is regularly provided to the public.

This exception permits the publication of a resolution passed by a state department. This exception only applies to "resolutions;" Subsection 117(1)(a)(III)(B) does not provide for the publication of "positions of advocacy."

No such resolution was passed in this case. The Treasurer argues that his press releases are *ipso facto* resolutions. However, the meaning of a "resolution" in terms of the FCPA is not so broad. In interpreting a statute, Courts must give words their plain and ordinary meaning. *Denver Area Labor Federation, AFL-CIO v. Buckley*, 924 P.2d 524, 527 (Colo. 1996). A "resolution" requires the action of a public body of more than one person, usually by a vote. *Black's Law Dictionary* defines "resolution" as "a formal expression of the opinion, intention, or decision by an official body or public assembly, (esp., a legislature)." *Black's Law Dictionary*, 7th Ed., 1999. The evidence in this case was that the Treasurer was the sole policy-making official at the Treasury Department. Also, no vote was taken.

Mere statements of the Treasurer's opinion are not "resolutions." If they were, any state-wide elected official with policy-making authority could issue an unlimited number of "resolutions" opposing a candidate or ballot issues and make meaningless the FCPA. In interpreting statutes, courts must avoid constructions that lead to absurd results. *People v. Gallegos*, 946 P.2d 946, 950 (Colo. 1997).

C. Sanction

1. As the Treasurer was responsible for the expenditure of more than \$50 of public moneys to oppose a state-wide ballot issue and as the "resolution" exception does not apply to his conduct, he has willfully and intentionally violated the FCPA at Section 1-45-117(1)(a)(I), C.R.S. Therefore, as set out in Section 1-45-111(2)(a), C.R.S., the ALJ must issue an appropriate order, sanction or relief authorized by the FCPA. Sanctions are provided for in Section 1-45-113, C.R.S. Subsection 113(1) makes it a class two misdemeanor for a violation of subsection 117. However, ALJ's of the Division of Administrative Hearings lack jurisdiction to hear criminal cases or to impose criminal penalties. The District Courts have original jurisdiction in these matters. Colo. Const. art VI, sec. 9(1).

2. Subsection 113(2), however, provides that in addition to the criminal penalty, any person who intentionally violates any provision of this article relating to


contribution limits shall be subject to a civil penalty of double the amount contributed in violation of the FCPA. As described in Subsection 117(1)(a)(l), spending public moneys in opposition to Amendment 23 is such a contribution.

As it was Coffman who ultimately made the decision to issue the press releases and other publications critical of Amendment 23, he alone must pay such penalty. He is a "person" as defined in Section 1-45-103(9), C.R.S.

Therefore, pursuant to Section 1-45-113(2), C.R.S., Mike Coffman shall pay to the Secretary of State a civil penalty of \$334.92.

DONE AND SIGNED

July 30, 2001


MATTHEW E. NORWOOD
Administrative Law Judge

OS 2001002

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, certified, postage prepaid, at Denver, Colorado to:

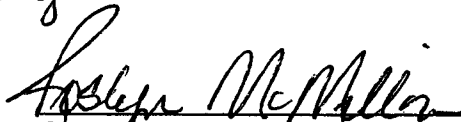
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and was served by courier pickup on: Terry M. Fox, Assistant Attorney General and Maurice Knaizer, Deputy Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO 80203, on this 02 day of ~~July~~, 2001.

August



Secretary to Administrative Law Judge