

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2001-012

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND AGENCY
DECISION**

**IN THE MATTER OF THE COMPLAINT FILED BY KATHY A. BEER REGARDING
ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART
OF THE CITY OF LOVELAND**

On August 29, 2001, Complainant Kathy A. Beer filed a complaint with the Colorado Secretary of State against the City of Loveland, alleging violations of Section 1-45-117 of the Fair Campaign Practices Act, Sections 1-45-101 through 1-45-118, C.R.S. ("FCPA"). 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.

In addition to filing an answer and amended answer, the City of Loveland ("the City") has also filed a Motion for Judgment on the Pleadings or, In the Alternative, Motion for Summary Judgment, with supporting exhibits and affidavits. Complainant has not filed a response to the City's motion.¹ The Administrative Law Judge treats the City's motion as a motion for summary judgment and, for the reasons stated below, grants the motion. Because the ruling on the City's motion disposes of all issues raised by the parties, this order constitutes an Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (2001).

ISSUE PRESENTED

The issue raised by the complaint in this matter is whether the City violated Section 1-45-117 of the FCPA by expending public funds by mailing a letter and flyers to residents of Loveland urging citizens of Loveland to vote for two City ballot issues at the City's regular election on November 6, 2001. The City does not dispute that it expended the public funds in question but asserts in its motion that such

¹ On October 29, 2001, Complainant informed a Division of Administrative Hearings (DOAH) paralegal that she has decided to withdraw her complaint and has sent written notice of that withdrawal to DOAH. However, because that written withdrawal has not been received by DOAH to date, the Administrative Law Judge issues this Order and Agency Decision in order to formally resolve this matter.

expenditures are not prohibited by the FCPA because they occurred prior to the time the titles were fixed for these local ballot issues.

SUMMARY JUDGMENT

The City has filed a motion for judgment on the pleadings or in the alternative summary judgment. Because the City has filed exhibits and affidavits in support of its motion, the Administrative Law Judge chooses to treat the motion as one for summary judgment.

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992); *Dominguez Reservoir Corp. V. Feil*, 854 P.2d 791 (Colo 1993). However, summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1339-40 (Colo. 1988).

In this case, based upon the affidavits and exhibits filed by the City and uncontroverted by Complainant, the Administrative Law Judge finds that the material facts in this matter are not in dispute. As a result, it is appropriate to address the City's motion and to determine if it is entitled to judgment as a matter of law.

UNDISPUTED MATERIAL FACTS

Based on the pleadings, as well as the affidavits and exhibits filed by the City which have not been controverted by Complainant, the Administrative Law Judge determines the following material facts are not in dispute in this matter:

1. On September 4, 2001, the Loveland City Council adopted Resolution #R-79-2001 referring to the voters pursuant to Section 31-11-111, C.R.S. and fixing the title of a ballot issue ("the excise tax measure") requiring the Loveland City Council to impose only at the time a building permit is issued an excise tax on new residential development to begin January 1, 2001, and to be spent for transportation capital improvements.
2. On September 4, 2001, the Loveland City Council also adopted Resolution #R-80-2001 referring to the voters pursuant to Section 31-11-111, C.R.S. and fixing the title of a ballot issue ("TABOR measure") authorizing the City of Loveland to collect and spend for a ten-year period for the purpose of police and fire, street construction and maintenance, and parks construction and maintenance, all City revenues in excess of the spending and revenue limitations imposed by Article X, Section 20 of the Colorado Constitution.

3. The only formal actions taken by the Loveland City Council to submit to the voters and to fix the titles of the excise tax measure and the TABOR measure ballot issues were those actions taken in Resolutions #R-79-2001 and #R-80-2001.

4. The City expended public moneys in excess of \$50.00 by producing and mailing to Loveland residents a letter and two flyers concerning the excise tax measure and the TABOR measure ballot measures. These documents included such language as “[s]upport the excise tax for a healthy road system” and “[w]ouldn’t you say yes to more funding for police and fire protection, parks and transportation services if taxes didn’t have to be increased?”

5. All of the City’s expenditures of public moneys related to the excise tax measure and the TABOR measure ballot issues, including the expenditure of public moneys for the production and distribution of the letter and the two flyers in question, were expended by the City prior to September 4, 2001.²

6. The City made no expenditure by the City of public moneys on or September 4, 2001, related to the City urging the voters to vote either for or against either the excise tax measure ballot issue or the TABOR measure ballot issue.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the uncontroverted record, the Administrative Law Judge enters the following additional findings and conclusions:

1. The City does not dispute that it is a political subdivision within the meaning of Section 1-45-117(1)(a)(I), C.R.S. (2001) of the FCPA.

2. The letter and flyers produced and distributed by the City concerning the excise tax measure and the TABOR measure ballot measures urge electors to vote in favor of the ballot measures and do not constitute factual summaries which include arguments both for and against the proposals.

3. The excise tax measure and the TABOR measure ballot issues were not submitted for the purpose of having a titled fixed pursuant to Section 31-11-111 and had not had a titled fixed pursuant to that section until September 4, 2001 when the Loveland City Council adopted Resolutions #R-79-2001 and #R-80-2001.

4. The excise tax measure and the TABOR measure ballot issues are local ballot issues.

² As used herein, “expenditure” occurs when the actual payment is made or when there a contractual agreement and the amount is determined.

5. Section 1-45-117(1)(a)(I)(B), C.R.S. (2001) of the FCPA does not prohibit the expenditure of public moneys to urge voters to vote in favor of or against a ballot issue prior to the title for the local ballot issue being fixed (or being submitted for the purpose of having a title fixed) pursuant to Section 31-11-111.

6. Although the excise tax measure and the TABOR measure ballot issues are "local ballot issues," at the time the City expended public moneys for the letter and flyers in question (prior to September 4, 2001), the measures were not local ballot issues covered by Section 1-45-117(1)(a)(I)(B) because the measures had not been submitted for the purpose of having a titled fixed pursuant to section 31-11-111 and had not had a title fixed pursuant to that section.

DISCUSSION

Complainant asserts the expenditure of public moneys by the City for the production and distribution of the letter and flyers in question constituted a violation of Section 1-45-117 of the FCPA. Although Complainant has not cited any specific provision of Section 1-45-117, it is apparent she intended to assert a violation of Section 1-45-117(1)(a)(I)(B). This section prohibits political subdivisions of the state, such as the City, from expending any public moneys or making any contributions to urge electors to vote in favor or against certain local ballot issues. Specifically, the section provides, in pertinent part:

No . . . political subdivision [of the state] . . . shall . . . expend any public moneys from any source, or make any contributions, to urge electors to vote in favor of or against any . . . [l]ocal 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 titled fixed pursuant to that section.

The City concedes that the excise tax measure and the TABOR measure were both local ballot issues. However, the City asserts that until September 4, 2001, the measures were not local ballot issues governed by the expenditure and contribution restrictions of Section 1-45-117(1)(a)(I)(B) because until that date the measures were not local ballot issues that had been submitted for the purpose of having a titled fixed pursuant to Section 31-11-111 or that had had a title fixed pursuant to that section. The Administrative Law Judge agrees.

Although the FCPA contains limitations which prevent political subdivisions from making contributions or expenditures for the purpose of urging electors to vote for or against certain measures, these prohibitions are circumscribed by the specific statutory language of the Act. In the case of local ballot issues such as the excise tax measure and the TABOR measure ballot issues at issue here, the FCPA imposes expenditure and contribution limitations only with respect to local ballot issues that have been submitted for the purpose of having a title set or that have had a title set

pursuant to Section 31-11-111.³ In this case, no such submission or title setting occurred until September 4, 2001. Thus, FCPA contribution limitations were not applicable to these measures until after September 4, 2001.

The evidence establishes that although the City made expenditures⁴ of public moneys for the purpose of urging electors to vote in favor of the measures in question prior to September 4, 2001, the City made no such expenditures after September 4, 2001. Thus, there is no evidence that the City made any expenditures in contravention of the provisions of Section 1-45-117(1)(a)(I)(B).⁵ As a result, no violation of the expenditure or contribution limitations of Section 1-45-117(1)(a)(I)(B) has been established.

In sum, the Administrative Law Judge concludes there are no genuine issues of material fact in dispute and the City is entitled to judgment as a matter of law. The City's motion for summary judgment is therefore granted.

CONCLUSIONS OF LAW

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

2. There are no genuine issues of material fact in dispute and the City is entitled to judgment as a matter of law.

3. The City did not violate Section 1-45-117(1)(a)(I)(B), C.R.S. (2001) of the FCPA in connection with its expenditures of public moneys prior to September 4, 2001, to urge electors to vote in favor of the excise tax measure and the TABOR measure ballot issues.

³ Section 31-11-111, C.R.S. provides for the fixing of ballot titles by the legislative body of a municipality or its designee for initiatives, referred measures and referenda.

⁴ As used herein, an "expenditure" occurs when the actual payment is made or when there is a contractual agreement and the amount is determined. See Section 1-45-103(6), C.R.S.(2001) and footnote 1.

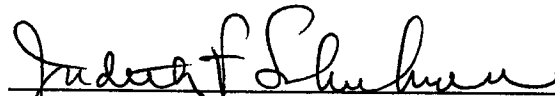
⁵ The prohibitions in Section 1-45-117(1)(a)(I)(B) relate to both expenditures and contributions. Complainant has not asserted any contribution violation and no evidence was presented indicating any contribution violation occurred.

AGENCY DECISION

The City's motion for summary judgment is granted. The City did not violate Section 1-45-117(1)(a)(l)(B), C.R.S. (2001) of the FCPA in connection with its expenditures of public moneys prior to September 4, 2001, to urge electors to vote in favor of the excise tax measure and the TABOR measure ballot issues. Therefore, the complaint in this matter is dismissed and the hearing scheduled for November 15, 2001 is vacated.

DONE AND SIGNED

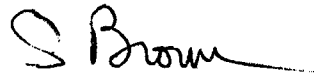
October 31, 2001



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: Kathy a. Beer, 2857 West 22 Street, Loveland, CO 80538; John R. Duval, Esq., City Attorney, 500 East Third Street, Loveland, CO 80537; 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 1 day of ~~October~~ NOV, 2001.



Secretary to Administrative Law Judge

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