

**BEFORE THE SECRETARY OF STATE**

**STATE OF COLORADO**

**CASE NO. OS 2001-016**

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**ORDER GRANTING SUMMARY JUDGMENT AND AGENCY DECISION**

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**IN THE MATTER OF THE COMPLAINT FILED BY MARIAN OLSON  
REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES  
ACT ON THE PART OF THE CITY OF GOLDEN AND ITS CITY MANAGER,  
CLERK, CITY ATTORNEY, FINANCE DIRECTOR AND CITY COUNCIL**

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Respondents have filed a Motion to Dismiss or in the Alternative for Summary Judgment in this matter. Complainant Marian Olson filed a response opposing this motion. This matter arises from a complaint filed on October 23, 2001, with the Colorado Secretary of State. The complaint alleges violations of the Fair Campaign Practices Act, Sections 1-45-101 to 118, C.R.S. (2001) ("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. (2001), of the FCPA.

**FINDINGS OF FACT**

Based upon the undisputed facts, the Administrative Law Judge finds as follows:

1. The City of Golden is a Home Rule City governed by a home rule charter.
2. On August 6, 2001, a signed petition seeking to have a proposed charter amendment submitted to Golden voters was presented to the Golden city clerk. This charter amendment would have eliminated the sales tax on food and beverages.
3. On August 29, 2001, Golden posted on its website an article entitled "Sales Tax Exemption of Food, Liquor and Restaurant Sales Frequently Asked Questions."
4. On September 6, 2001, after the city clerk had deemed the petition sufficient, the Golden City Council approved Resolution No. 1225 fixing the ballot title, setting the matter for election, and directing the city clerk to provide public notice of the election. The resolution cites Sections 31-2-210(3) and (4), C.R.S., as the source of its authority to set the ballot title and submit the proposed charter amendment to the voters.
5. On September 24, 2001, David Huffman, a Golden elector, filed a lawsuit in Jefferson County District Court against the Golden City Council,

Golden City Clerk, and Jefferson County Clerk and Recorder challenging the City's ballot title setting for the ballot question at issue in this proceeding. The Complaint in that matter included an allegation that the ballot title for the proposed charter amendment did not correctly and fairly express the true intent and meaning of the measure.

6. On September 28, 2001, the Jefferson County District Court dismissed the Huffman Complaint on the grounds that it did not comply with Section 1-11-203.5, C.R.S., in that it was not timely filed and was not a verified petition.

7. On October 11, 2001, the Golden City Council approved Resolution No. 1240, 1241, and 1242 urging electors to reject three proposed charter amendments, including the one prohibiting of sales tax on food and beverages.

8. On May 13, 1999, and Aril 26, 2001, respectively, the Golden City Council approved Resolution Nos. 1456 and 1540 adopting the Uniform Election Code of 1992, Title 1, Articles 1-13, in lieu of the Colorado Municipal Election Code. In addition, Resolution No. 1540 provides that regular municipal elections held in odd numbered years will be conducted by the Jefferson County Clerk and Recorder as part of a county-wide coordinated mail ballot election and that such elections will be conducted in accordance with the provisions of the FCPA.

## DISCUSSION

I. The Complaint. The Complaint in this matter charges violations of two provisions of the FCPA [Section 1-45-117(1)(a)(I)(B) and Section 1-45-117(1)(b)(III)(A), C.R.S.], as well as a violation of the ballot fixing provisions of Section 31-11-111(3), C.R.S. Each of these will be discussed separately.

A. The Complaint charges that by preparing and distributing a sheet entitled "Sales Tax Exemption of Food, Liquor and Restaurant Sales Frequently Asked Questions," Respondents expended public money to urge electors to vote against the proposed charter amendment. Section 1-45-117(1)(a)(I)(B) provides as follows:

(1) (a) (I) No agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof shall make any contribution in campaigns involving the nomination, retention, or election of any person to any public office, nor shall any such entity expend any public moneys from any source, or make any contributions, 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;

By its terms, this statutory prohibition is only applicable to local ballot issues which have been submitted for the purpose of having a title fixed pursuant to Section 31-11-111. Title 31, Article 11 implements procedures in furtherance of the exercise of initiative and referendum powers reserved to municipal electors under the Colorado Constitution, Art. V, § 1(9). In the case at hand, however, the ballot title was not fixed pursuant to Section 31-11-111 but rather pursuant to Section 31-2-201 of the Municipal Home Rule Act of 1971. The Municipal Home Rule Act is designed to implement the Colorado Constitution, Art. XX, § 9, and specifically states that it applies to the amendment of municipal home rule charters. Section 31-2-202, C.R.S. In addition, the Golden City Council in this matter actually set the ballot title for the proposed charter amendment pursuant to Sections 31-2-210(3) and (4), C.R.S. Under these circumstances, when the amendment of a home rule charter is governed by the Municipal Home Rule Act and the ballot title was actually set pursuant to the Municipal Home Rule Act, the title to this local ballot issue was not fixed pursuant to Section 31-11-111 and the FCPA prohibition against spending public moneys to urge voters to vote against the measure does not apply.

The fact that Section 31-2-203(1) of the Municipal Home Rule Act adopts the Section 31-11-103(1) definition of a "ballot title" does not imply, as Complainant contends, that the FCPA's reference to ballot titles set pursuant to Section 31-11-111 also encompasses those set pursuant to Section 31-2-210. Likewise, the fact that Section 31-2-210(1), C.R.S., provides that proceedings to amend a home rule charter may be "initiated" by various methods does not imply that these procedures constitute initiatives pursuant to Title 31, Part 11, such that the setting of the ballot titles for amendments to home rule charters can reasonably be considered to have occurred pursuant to Section 31-11-111. The complaint also asserts that Section 31-2-210 does not control the fixing of a ballot title for a home rule charter amendment because its terms are less comprehensive than those of Section 31-11-111. Section 31-2-210, however, adequately specifies the procedures to amend a home rule charter and, absent its adoption of the procedures in Section 31-11-111, controls this issue.

Neither party referred to the language of Resolution No. 1540 providing that municipal elections be held in accordance with the FCPA. The FCPA controls numerous campaign practices. The Administrative Law Judge does not find that this general language in Resolution No. 1540, adopted in advance of the charter amendment being placed on the ballot, was intended to subject otherwise non-covered ballot issues to the FCPA provisions limiting certain public expenditures.

B. The Complaint also asserts that Respondents have violated Section 1-45-117(1)(b)(III)(A) by passing resolutions (Resolution No. 1240, 1241, and 1242) opposing the three proposed charter amendments and urging voters to vote against them. Section 1-45-117(1)(b)(III)(A) states as follows:

(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) . . . .

The Complaint contends that the term "advocacy" refers only to a positive stand in support of a ballot issue, such that it would permit the Golden City Council to pass a resolution supporting a proposed charter amendment but not opposing it.

The Administrative Law Judge need not, however, address the proper definition of "advocacy." The provisions of Section 1-45-117(1)(b)(III)(A) regarding advocacy carve out an exception to the general proscriptions of subsection (1), which, as addressed above, do not apply to the home rule charter amendments in this proceeding. Consequently, no violation of Section 1-45-117(1)(b)(III)(A) can be shown.

C. The Complaint also appears to raise the additional issue of whether the ballot title of the food tax amendment violated Section 31-11-111(3), C.R.S. To the extent that the Complaint does assert this violation, it is beyond the Administrative Law Judge's jurisdiction. The Secretary of State has referred this Complaint to the Administrative Law Judge pursuant to the FCPA, and the Administrative Law Judge has no jurisdiction to consider alleged violations of other statutory provisions.

Pursuant to the Uniform Election Code of 1992, the exclusive procedure to contest the form or content of a ballot title is district court, and the district court which first acquires jurisdiction enjoys exclusive jurisdiction. Sections 1-11-203.5(1) and (5), C.R.S. By resolution, the Golden City Council adopted the procedures of the Uniform Election Code regarding elections.<sup>1</sup> A contest regarding the form or content of the ballot title at issue in this proceeding has already been filed in the Jefferson County District Court, which thereby acquired exclusive jurisdiction over the matter and which has in fact resolved the matter. The Complaint filed in that matter included an allegation that the ballot title for the proposed charter amendment did not correctly and fairly express the true intent and meaning of the measure, which is the gist of the charge asserted in this matter pursuant to Section 31-11-111(3), C.R.S. The Administrative Law Judge therefore lacks jurisdiction to consider the portion of the Complaint disputing the ballot title.

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<sup>1</sup> Municipalities are permitted by Section 1-1-102(1), C.R.S., to adopt the Uniform Election Code of 1992 in lieu of the Colorado Municipal Election Code of 1965 (Title 31, Article 10).

II. Nature of Summary Judgment. Summary judgment is proper when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c), *West American Insurance Co. v. Baumgartner*, 812 P.2d 696 (Colo. App. 1990). The burden of establishing that there is no genuine issue of material fact falls initially on the moving party. *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987); *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000). The non-moving party, here, the Board, is entitled to the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. All doubts as to whether an issue of fact exists must be resolved against the moving party. *Aspen Wilderness Workshop, Inc., v. Colorado Water Conservation Board*, 901 P.2d 1251 (Colo. 1995); *Sender v. Powell*, 902 P.2d 947 (Colo. App. 1995). The movant may satisfy this burden by showing there is no record evidence supporting the nonmoving party's case. Once the movant has met the initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Civil Service Commission v. Pinder*, 812 P.2d 645 (Colo. 1991); *Schultz v. Wells, supra*.

In this matter, Respondents have demonstrated that there is no genuine issue as to any material fact and have further demonstrated that they have not violated the FCPA and are therefore entitled to judgment as a matter of law. Accordingly, Respondents' motion for summary judgment is granted,

#### **AGENCY DECISION**

It is the Agency Decision that this Complaint is dismissed in its entirety. The setting conference scheduled in this matter for January 24, 2001, is vacated.

**DONE AND SIGNED**

January 16, 2002

  
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NANCY CONNICK  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above **AGENCY DECISION** was sent U.S. Mail, postage prepaid, in Denver, Colorado to:

Josh A. Marks, Esq.  
Jennifer L. Veiga, Esq.  
Hall & Evans, LLC  
1200 17th Street, Suite 1700  
Denver, CO 80202

Victor F. Boog, Esq.  
Linda A. Battalora, Esq.  
Victor F. Boog & Associates, PC  
143 Union Blvd, Suite 625  
Lakewood, CO 80228-1827

and via interoffice mail to: Donetta Davidson, Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on January 17<sup>th</sup>, 2002.

  
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Secretary to Administrative Law Judge

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