

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2002-012

AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY MICHAEL MULLER REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART OF STEVE BURKHOLDER, LAKEWOOD CITY MAYOR.

On August 20, 2002, Complainant Michael Muller filed a complaint with the Colorado Secretary of State against Steve Burkholder, Lakewood City Mayor, alleging violations of the Fair Campaign Practices Act, Sections 1-45-101- 1-45-118, C.R.S. (2002) ("the Act"). 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. (2002) of the Act.

Hearing was held in this matter October 8, 2002. Complainant appeared and represented himself. Steve Burkholder appeared and was represented by John E. Hayes of Hayes, Phillips, Hoffmann & Carberry, P.C. The Administrative Law Judge issues this Agency Decision pursuant to Section 1-45-111(2)(a), C.R.S. (2002) and Section 24-4-105(14)(a), C.R.S. (2002).

ISSUE PRESENTED

The issue to be determined in this proceeding is whether Steve Burkholder violated Section 1-45-117 of the Act by writing a letter on City of Lakewood letterhead endorsing the candidacy of Sam Zakhem for the Republican nomination for the 7th Congressional District.

STIPULATED FACTS

At the commencement of the hearing the parties stipulated to the following facts which the ALJ enters as findings in this matter:

1. Steve Burkholder is the duly elected Mayor of the City of Lakewood, Colorado. In such capacity, he is a member of the Lakewood City Council and has a vote on all matters coming before the City Council. In his capacity as Mayor and member of the City Council, Mayor Burkholder has policy-making responsibilities.

2. Mayor Burkholder wrote a letter dated May 20, 2002, attached hereto as Exhibit A, in which he endorsed Sam Zakhem's election as nominee for the elected public office described therein.

3. The total expenditure of City of Lakewood funds utilized in the typing of the letter attached as Exhibit A is \$2.35.

4. Mayor Burkholder has reimbursed the City of Lakewood in the amount of \$2.35 by his special Account check number 4722, issued on August 5, 2002.

5. The following statements contained in Muller's letter of complaint filed with the Secretary of State on August 20, 2002 are admitted by the parties and are undisputed: "On August 1st, I received, by mail, a letter from the Mayor of Lakewood, Colorado on his city stationary (*sic*), asking his constituents to vote for Sam Zakhem in his congressional primary election. Steve Burkholder has admitted in public that he did use city supplies and labor for his endorsement, this same letter was used in the Zakhem campaign literature."

DISCUSSION

1. The Act prohibits political subdivisions of the state, such as the City of Lakewood, from making "any contribution in campaigns involving the nomination, retention, or election of any person to any public office." Section 1-45-117(1)(a)(I), C.R.S. (2002). In addition, the Act prohibits political subdivisions from making "any contributions to urge electors to vote in favor or against" specified "state-wide ballot issues," specified "local ballot issues," and certain referred and recall measures. Section 1-45-117(1)(a)(I)(A)-(C), C.R.S. (2002).

Complainant maintains, and Mayor Burkholder concedes, that by issuing a letter of support on City of Lakewood letterhead for Sam Zakhem's candidacy for the Republican nomination for the 7th Congressional District, Mayor Burkholder made contributions and expended public moneys of the City of Lakewood in support of a "campaign[] involving the nomination . . . of any person to any public office." Complainant asserts such action violated the prohibition of Section 1-45-117(1)(a)(I), C.R.S. (2002). In defense, Mayor Burkholder asserts his actions were permissible under an exemption to the Section 1-45-117(1)(a)(I), C.R.S. found at Section 1-45-117(1)(a)(II), C.R.S. (2002). Because the ALJ determines the exemption claimed by Mayor Burkholder is limited to the expenditure of public moneys in support of ballot issues and does not apply to expenditures of public funds for, or contributions to, candidate campaigns, the ALJ determines Mayor Burkholder violated the provisions of Section 1-45-117(1)(a)(I), C.R.S. (2002) by issuing the letter in question.

2. Mayor Burkholder concedes his action in issuing a letter of support for Sam Zakhem's candidacy on City of Lakewood stationery and with City personnel assistance constituted an expenditure of public funds to support a candidate's campaign for nomination to public office. See Section 1-45-103(1.5), C.R.S. (2002) defining candidate

as including a primary candidate. It is also apparent that such expenditure constituted "a thing of value given directly or indirectly to a candidate for the purpose of promoting the candidate's nomination" and therefore constituted a "contribution," as defined in Section 1-45-103(4)(a)(IV), C.R.S. (2002). Thus, by issuing the letter in support of Sam Zakhem, Mayor Burkholder expended public funds to make a contribution in a campaign involving the nomination of a person to public office, as prohibited by Section 1-45-117(1)(a)(I), C.R.S. (2002).

3. Although Mayor Burkholder relies on an exemption found at Section 1-45-117(1)(a)(II), that exemption does not apply here. Section 1-45-117(1)(a)(II) provides:

However. . . 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 paragraph (I) of this paragraph (a).
[Emphasis supplied].

It is undisputed that Mayor Burkholder is an elected official of a political subdivision and has policy-making political responsibilities. He is therefore an individual covered by the exemption. However, contrary to his assertions, Mayor Burkholder's actions are not governed by the exemption.

Section 1-45-117(1)(a)(I), to which the exemption refers, addresses both candidate campaign contributions and expenditures of public moneys for certain types of ballot issues: specified state-wide and local ballots as well as certain referred measures and recall measures. However, a close reading of the statute reveals that the exemption upon which Mayor Burkholder relies relates only to the latter items, that is, the ballot issues, and does not include the Mayor's contribution to a candidate campaign.

A. There are two bases for this conclusion. First, the plain meaning of the exemption indicates no exemption for campaign contributions was intended. The exemption language references only public expenditures incidental to expressing an opinion concerning an *issue* described in Section 1-45-117(1)(a)(I); there is no reference in the exemption to candidate campaigns.

B. Second, although Mayor Burkholder asserts that the exemption's reference to "any such issue" should be read to include candidate campaign contributions, the ALJ disagrees. Although the word "issue" is not expressly defined in the Act, the term "issue committee" is defined at Section 1-45-103(8), C.R.S. (2002) with specific reference to "ballot issues" (*e.g.*, Section 1-45-103(8)(a)(I) defines issue committees as groups formed to accept contributions or make expenditures "to support or oppose any ballot issue or ballot question"). By so doing, the Act evidences an intent to use "issue" and "ballot issue"

synonymously and thereby evidences an intent not to include candidate campaigns within the meaning of the term "issue."

C. Mayor Burkholder has cited *Regents of the University of Colorado v. Meyer*, 899 P.2d 316 (Colo. App. 1995) in support of his position that his expenditures are exempt under the Act. This case does not sustain the Mayor's position and, in fact, provides support for the conclusion that the exemption cited is limited to expenditures for ballot measures.

Regents of the University of Colorado v. Meyer involved the University's inclusion in a monthly newsletter (and concomitant expenditure of some amount of public funds) of information concerning two ballot issues, a proposed constitution amendment concerning taxation and an initiative concerning Great Outdoors Colorado. In determining the University's expenditure fell within the exemption relied upon in this case by Mayor Burkholder, the Court of Appeals noted the section exempts expenditures of "public funds up to the \$50 limit in expressing an opinion about a pending *ballot* issue." 899 P.2d 318-319 [emphasis supplied]. The Court thereby clarified that the reference in the exemption to expenditures relating to "issues" in fact relates *ballot* issues (and thus does not include contributions to candidate campaigns).

Because the exemption found at Section 1-45-117(1)(a)(II) is inapplicable to the expenditure involved in this case, the undisputed evidence supports a determination that Mayor Burkholder's actions in this matter violated Section 1-45-117(1)(a)(I). By issuing a letter in support of Sam Zakhem's candidacy utilizing City of Lakewood stationery and assistance of City personnel, Mayor Burkholder expended public funds to support a candidate's campaign for nomination to public office. This expenditure constituted a "contribution," as defined in Section 1-45-103(4)(a)(IV), C.R.S. (2002). Thus, Mr. Burkholder, in his official capacity as Mayor of Lakewood, made a contribution utilizing public funds in a campaign involving the nomination of a person to public office, as prohibited by Section 1-45-117(1)(a)(I), C.R.S. (2002).

4. The facts established that the expenditure involved was indeed minimal: the entire cost to the City of Lakewood was \$2.35. However, no exception for *de minimus* non-exempt expenditures is explicitly provided in the Act and the ALJ declines to engraft one.

5. Mayor Burkholder also asserts that any violation of the Act was cured by his action in reimbursing the City of Lakewood for the amount in question. The ALJ disagrees. While the minimal dollar amount involved in this case coupled with the Mayor's action in reimbursing the City indicates the statutory violation here was of extremely limited proportions, it is nevertheless true that a statutory violation occurred. Specifically, a harm the Act is designed to prevent occurred when the Mayor placed his endorsement letter on City of Lakewood stationery and used a City employee to do so. The repayment under the facts of this case does not undo the initial violation, although it shows the Mayor's good faith in attempting to comply after the fact with the Act.

In sum, the ALJ concludes Complainant has met his burden of establishing a violation of Section 1-45-117(1)(a)(I), C.R.S. (2002) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

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


2. By issuing a letter of support for Sam Zakhem's candidacy on City of Lakewood stationery and with City personnel assistance, Mayor Burkholder expended public funds to support a candidate's campaign for nomination to public office and made a contribution in a campaign involving the nomination of a person to public office, as prohibited by Section 1-45-117(1)(a)(I), C.R.S. (2002).

AGENCY DECISION

Pursuant to Section 1-45-117(4), C.R.S. (2002), any violation of Section 1-45-117 is subject to sanctions as authorized in Section 1-45-113 or any other appropriate relief or order. Complainant does not seek the imposition of any sanction and merely seeks an explication of the law. In view of this request as well as the limited violation involved, the ALJ determines that imposition of a sanction in this matter is not appropriate. Therefore, no sanction is imposed in this matter.

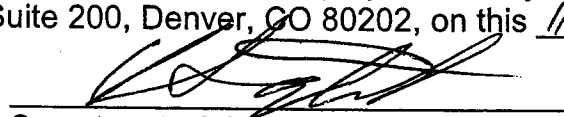
DONE AND SIGNED

December 9, 2002


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: Michael Muller, 868 So. Owens Ct., Lakewood, CO 80226; John E. Hayes, Hayes, Phillips, Hoffmann & Carberry, P.C., 1350 17th Street, Suite 450, Denver, CO 80202; and was served via inter-office mail on William A. Hobbs, Deputy Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on this 11 day of December, 2002.


Secretary to Administrative Law Judge