

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

CASE NO. OS 2003015

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY MARTIN G. BOLT, SR.
REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES
ACT BY THE CITY OF LITTLETON, KELLI NARDE AND JULIE BOWER.**

Hearing in this matter was held before Administrative Law Judge (ALJ) Michelle A. Norcross on September 10, 2003, at the Division of Administrative Hearings in Denver. Martin G. Bolt, Sr., (Complainant) who is not an attorney, represented himself. J. Andrew Nathan, Esq., represented the City of Littleton, Kelli Narde and Julie Bower (Respondents). At hearing, the ALJ admitted Exhibits 1 through 6 and A through D. The hearing was electronically recorded on tape number 6693.

NATURE OF THE COMPLAINT

In this case, the Complainant alleges that the Respondents' violated Section 1-45-117(1)(a)(I), C.R.S. of the Fair Campaign Practices Act by making expenditures of public money in opposition of a local ballot issue.

FINDINGS OF FACT

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

1. On August 19, 2003, the City of Littleton (City) issued a press release concerning certification of a local ballot initiative to reduce and ultimately repeal the City's one percent tax on food purchased for home preparation (grocery tax). (Exhibit 1)
2. Kelli Narde, Assistant to the City Manager, prepared the press release. Other individuals including, Jim Woods, City Manager; Larry Berkowitz, City Attorney; Julie Bower, City Clerk; and Mayor Susan Thornton, reviewed, edited, and approved the press release prior to its issuance.
3. Ms. Narde spent approximately two hours of her work time to draft and finalize the press release. Based on estimates provided by the City, Mr. Woods, Mr. Berkowitz and Ms. Bower spent no more than 10 to 20 minutes of

work time reviewing and editing the press release. There is no evidence regarding the time Mayor Thornton spent on the press release. (Exhibits 2 and 3).

4. All City personnel involved in the preparation of the press release are salaried employees and were paid their salaried wages while working on the press release.

5. Since 1959, the City has been a home rule municipality. The City charter governs, among other things, local elections and initiatives and referendums. Sections 45 through 48 discuss the procedure for submitting ballot initiatives and referendums. (Exhibit C)

6. On September 9, 1999, the City Council adopted Ordinance No. 28 that repealed Title 1, Chapter 7, Section 1 of the Littleton City Code, the second paragraph thereof relating to the Uniform Election Code. (Exhibit B)

7. As a result of Ordinance No. 28, Article 11 of Title 31 of the Colorado Revised Statutes no longer applies to any City initiative or referenda. (Exhibit A)

8. The ballot initiative to repeal the grocery tax was not submitted for the purposes of having a title fixed under § 31-11-111, C.R.S. The petition was submitted to the City Clerk for certification.

9. On August 15, 2003, Ms. Bower, in her capacity as City Clerk issued a Certificate of Sufficiency certifying that the initiative petition to reduce and then repeal the grocery tax was examined and found to be sufficient.

10. Following Ms. Bower's certification, the City issued the press release at issue in this matter. Complainant contends that the press release violates the Fair Campaign Practices Act because "city resources were used to place our petition in an unfavorable light". (See Complainant's complaint filed with the Secretary of State on August 24, 2003).

DISCUSSION AND CONCLUSIONS OF LAW

Applicability of Fair Campaign Practices Act. The City argues that Complainant's complaint must be dismissed as a matter of law because § 1-45-117, of the Fair Campaign Practices Act (FCPA) does not apply to the City.

Section 1-45-117(1)(a)(I), C.R.S. provides, "[n]o 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 an person to any public office, nor shall any such entity expend any public monies from any source, or make any contributions, to urge electors to vote in favor of or against any:

- (A) State-wide ballot issue that has been submitted for the purpose of having a title designated and fixed pursuant to section 1-40-106(1) or that has had a title designated and fixed pursuant to that section;
- (B) Local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or than has had a title fixed pursuant to that section;
- (C) Referred measure, as defined in section 1-1-104(34.5);
- (D) Measure for the recall of any officer that has been certified by the appropriate election official for submission to the electors for their approval or rejection.

The FCPA does not prohibit public expenditures in relation to every proposition that may appear on a ballot. In order to fall within the proscriptions of § 1-45-117(1)(a)(I), the election at issue must fall within one of the types enumerated in subsections (A), (B), (C), or (D). Each of these possible characterizations must thus be considered.

Statewide Ballot Issue - § 1-45-117(1)(a)(I)(A). It is undisputed that the initiative petition to reduce and ultimately repeal the City's grocery tax is not a statewide ballot issue. The proposal to repeal the City's grocery tax is a local issue.

Local Ballot Issue - § 1-45-117(1)(a)(I)(B). While repeal of the City grocery tax is a local ballot issue, it must also meet the statutory definition of this term under the FCPA in order to qualify as such. The FCPA applies to a certain type of local ballot issue, i.e., one "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."

In the instant case, the ballot issue was not submitted for the purpose of having a title fixed or has had a title fixed pursuant to § 31-11-111. In accordance with the City's charter and ordinances, article 11 of title 31 of the Colorado Revised Statutes has no applicability to any City initiative or referendum. Thus, the ballot issue in question is not covered by § 1-45-117(1)(a)(I)(B).

Referred Measure - § 1-45-117(1)(a)(I)(C). The FCPA also applies to referred measures, as defined in § 1-1-104(34.5), C.R.S.

“Referred measure”, includes any ballot question or ballot issue submitted by the general assembly or the governing body of any political subdivision to the eligible electors of the state or political subdivision pursuant to article 40 or 41 of this title.

In this case, neither Article 40 nor 41 of Title 1 applies to the ballot initiative. Article 40 applies to all statewide ballot issues that are authorized by the state constitution pursuant to initiative and referendum. Because the initiative concerning repeal of the grocery tax is not a state ballot issue, Article 40 does not apply. In addition, Article 41 addresses only odd-year elections on matters related to government revenue raising and appropriations, which is not subject of the ballot initiative in question. Therefore, the ballot initiative at issue does not meet the statutory definition of a referred measure and does not trigger the applicability of § 1-45-117(1)(a)(I)(C).

Recall Measure - § 1-45-117(1)(a)(I)(D). The FCPA also prohibits the expenditure of public funds to urge electors to vote for or against the recall of an officer. This is clearly not the subject matter of the ballot initiative and therefore this subparagraph does not apply to this case.

Since the ballot initiative is not a statewide ballot issue, a local ballot issue governed by § 31-11-111, a referred measure, or a recall measure, § 1-45-117(a)(1)(I) does not apply.

Based on the conclusion that § 1-45-117(1)(a)(I) does not apply to the City in this case, the ALJ does not reach the issue of whether the City’s press release urges electors to vote in favor or against the ballot initiative or whether the press release was a factual summary that included arguments both for and against the proposal to repeal the City’s grocery tax.

AGENCY DECISION

It is the Agency Decision of the Administrative Law Judge that § 1-45-117(a)(1)(I) does not apply to the City and, therefore, Complainant’s complaint must be dismissed as a matter of law. Pursuant to Pursuant to § 1-45-111(2)(a), C.R.S., the decision of the Administrative Law Judge shall be final and subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S.

DONE AND SIGNED
September 12, 2003

Michelle A. Norcross
Administrative Law Judge

CERTIFICATE OF MAILING

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

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William Hobbs
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on this ____ day of September, 2003.