

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO**

CASE NO. OS 2004-0024

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY FRANK GRIMALDI REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE TOWN OF
MEAD, COLORADO**

The hearing in this case was conducted on November 18, 2004 at the Division of Administrative Hearings in Denver, Colorado. Complainant Frank Grimaldi represented himself. The Town of Mead, Colorado (the Town) was represented by Richard E. Samson, Esq. The hearing was digitally recorded in Courtroom E from 1:00 p.m. to 4:00 p.m.

NATURE OF THE CASE AND ISSUES PRESENTED

This case involves allegations by complainant Frank Grimaldi that the Town violated Section 117 of the Fair Campaign Practices Act, Section 1-45-117, C.R.S. (2004) (the FCPA). Grimaldi alleges that the Town violated Section 117 when the mayor of the Town, Richard Kraemer, sent a letter to registered voters of Mead regarding a September 28, 2004 election to annex certain property to the Town. The complaint asserts that Kraemer's letter improperly supported the annexation proposal in violation of Section 117 of the FCPA. The complaint also asserts that this letter expressed Kraemer's opinion on the annexation issue and that, in doing so, the Town exceeded the limit of fifty dollars in expenditures allowed by Section 1-45-117(1)(a)(II). The complaint further claims that Kraemer's letter was not a balanced factual summary, and that the letter improperly expressed a conclusion and opinion in favor of the annexation, in violation of Section 1-45-117(1)(b)(I) of the FCPA.

The Town maintains that the annexation election does not fall within the coverage of Section 117 of the Act and that the Administrative Law Judge and the Secretary of State therefore do not have jurisdiction over this matter. The Town also argues that Kraemer's letter was factually accurate and fairly represented the arguments for and against the annexation.

FINDINGS OF FACT

Based upon the evidence presented at the hearing and the stipulations of the parties the Administrative Law Judge makes the following Findings of Fact:

1. On August 9, 2004 the Board of Trustees, the governing body of the Town, adopted Town of Mead, Colorado Ordinance 501. Ordinance 501 placed the following question on the ballot for an election on September 28, 2004: "Shall the Town of Mead Colorado, annex to the town the property known as the Hilgers/Schmidt/Rademacher annexation?" This ordinance provided that this question constituted the ballot title.

2. Richard Kraemer, the mayor of the Town, sent a letter dated September 23, 2004 to the registered voters of the Town. A portion of this letter described the pros and cons of the Hilgers/Schmidt/Rademacher annexation (referred to hereafter as "the annexation"). The letter set forth several reasons why the annexation would be a positive step for the Town and said very little that was negative about the annexation.

3. Kraemer's letter contained five paragraphs of arguments in favor of the annexation and one paragraph describing the case against annexation. The September 23 letter concluded its discussion of the benefits of the annexation with the following statement:

This is clearly the most suitable land use for this very valuable and strategic parcel, and has the greatest potential to the Town for the foreseeable future in bringing in new revenues to help pay for services in the Town that people want. Another benefit is that Town residents can go there to shop and work, but residents from elsewhere would not typically be driving through Mead to get there. This new development would benefit the Town without demanding many services from the Town.

4. The full text of the paragraph titled "CONS" stated the following: "As with all annexations, there is the impact of additional traffic and additional demands on municipal services. Those impacts should be weighed against the possibility of this property being developed without being annexed to the Town".

5. The cost to the Town to prepare and mail Kraemer's September 23 letter, in out of pocket expenses and personnel costs, was \$528.91.

6. A majority of the registered electors of the Town approved the annexation at the September 28, 2004 election. As a result the Board of Trustees adopted Town of Mead, Colorado Ordinance 517 on October 11, 2004. Ordinance 517 annexed the property in question to the Town.

7. On April 18, 1995 the voters of the Town adopted an initiative submitted by a group of residents that imposed certain conditions on the annexation of land to the Town. The substance of this initiative was later enacted by the Board of Trustees as Ordinance 273.

8. On June 12, 1995 the Board of Trustees of the Town adopted Ordinance 273 in order to fully implement the language of the April 18, 1995 voter initiative. This ordinance amended Section 3-3-1.6 of the Mead Land Use Code to provide that approval of an annexation must be by ordinance and that an annexation ordinance must be approved by a majority of the registered electors voting at a regular or special election.

9. Ordinance 273 also amended Section 13-2-1 of the Mead Land Use Code to provide that no territory could be annexed to the Town unless the annexation is approved by a majority of the registered electors voting at a regular or special election.

10. The Board of Trustees of the Town adopted Ordinance 304 on June 10, 1996. Ordinance 304 again amended Section 3-3-1.6 of the Mead Land Use Code. Ordinance 304 amended the procedure for approval of an annexation by the voters. Under Ordinance 304 the Board of trustees of the Town would first approve the annexation by resolution. Then, an election would be set. If the proposed annexation is approved by a majority of the registered electors voting at the election the Town's board of trustees must then approve the annexation by ordinance.

11. On October 4, 2004 Kraemer reimbursed \$528.91 to the Town for the expenses incurred in preparing and sending the September 23 letter.

DISCUSSION

1. Grimaldi's complaint alleges that Mayor Kraemer's September 23, 2004 letter caused the Town to violate Section 117 of the FCPA. Section 117 prohibits a political subdivision of the state from expending any public money or making any contributions to urge electors to vote in favor of or against four specified types of ballot issues. Section 1-45-117(1)(a)(I), C.R.S. (2004). Despite this prohibition certain policy-making officials are permitted to expend up to fifty dollars of public money to express their opinion on the specified ballot issues. Section 1-45-117(1)(a)(II), C.R.S. (2004). In addition, the Act permits a political subdivision of the state to expend public money or make contributions to dispense a factual summary on an issue. The factual summary must include arguments both for and against the proposal and can not contain a conclusion or opinion in favor of or against an issue. Section 1-45-117(1)(b)(I), C.R.S. (2004).

Fairly read, Grimaldi's complaint alleges that the Town violated Section 117 of the FCPA when it expended public funds to produce and distribute Kraemer's September 23 letter, a letter that allegedly supported the annexation proposal. The

complaint also asserts that in doing so the Town exceeded the limit of fifty dollars in expenditures allowed by Section 1-45-117(1)(a)(II). The complaint further claims that the September 23 letter was not a balanced factual summary as permitted by Section 1-45-117(1)(b)(I), and that the letter improperly expressed a conclusion and opinion in favor of the annexation in violation of that section of the FCPA.

2. The Town argues that Section 117 of the FCPA does not apply to the annexation election in this case and that the Administrative Law Judge and the Secretary of State therefore do not have jurisdiction over the complaint. The FCPA's prohibition against public entities expending public money or making contributions to urge electors to vote for or against a measure is limited to four types of ballot issues specified in the statute. Section 1-45-117(1)(a)(I) establishes this prohibition only as to the following four types of elections:

(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 that 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.

Section 1-45-117(1)(a)(I)(A) – (D), C.R.S.

Neither party contends that the Town's September 28, 2004 annexation election was a state-wide ballot issue covered by Section 117(1)(a)(I)(A) or a recall election described in Section 117(1)(a)(I)(D). Further, the annexation election was not a referred measure as defined in Section 1-1-104 (34.5), C.R.S., and thus was not a type of election covered by Section 117(1)(a)(I)(C) of the FCPA. Section 1-1-104(34.5), C.R.S. defines "referred measure" as including any ballot question or ballot issue submitted by the governing body of a political subdivision pursuant to articles 40 or 41 of title 1, C.R.S. Article 40 relates to state ballot issues authorized by the state constitution (Section 1-40-103(1), C.R.S.)). Article 41 deals with elections involving section 20 of article X of the Colorado Constitution, the Taxpayers' Bill of Rights (Section 1-41-101 – 103, C.R.S.). The annexation election in this case was neither a statewide ballot issue nor a Taxpayers' Bill of Rights election.

3. The jurisdictional issue presented is therefore whether the annexation election was a local ballot issue that had been submitted for the purpose of having a title

fixed pursuant to Section 31-11-111, C.R.S. or that has had a title fixed pursuant to that section. Section 117(1)(a)(l)(B), C.R.S. The portions of Section 31-11-111 relevant to this case provide as follows:

(1) After an election has been ordered pursuant to section 31-11-104 or 31-11-105, the legislative body of the municipality or its designee shall promptly fix a ballot title for each initiative or referendum.

(2) The legislative body of any municipality may, without receipt of any petition, submit any proposed or adopted ordinance or resolution or any question to a vote of the registered electors of the municipality. The legislative body of the municipality or its designee shall fix a ballot title for the referred measure.

The annexation election in this case was not an election ordered pursuant to Section 31-11-104 or 31-11-105, C.R.S. Section 31-11-104 deals with an election to adopt an ordinance that is proposed by means of a petition signed by at least five percent of the registered electors of a town. Section 31-11-105 involves an election on a referendum petition protesting the adoption of an ordinance by the legislative body of a municipality. The annexation election at issue in this case involved neither of these situations. Therefore, it was not an election covered by Section 31-11-111(1).

4. The annexation election also did not fall within the coverage of Section 31-11-111(2), C.R.S. That section allows the legislative body of a municipality, at its discretion, to submit to a vote of registered electors a proposed ordinance, resolution or other question other than those required to be voted upon under Section 31-11-111(1). The Town's annexation questions, including the one in this case, are not submitted to a vote of registered electors at the discretion of the Town's Board of Trustees. Rather, a voter-approved initiative (which was later codified as Ordinance 273) requires the Board of Trustees to submit any annexation proposal to a vote of registered electors. See *Minch v. Town of Mead*, 957 P.2d 1054 (Ct. App. 1998) (the voter initiative requiring elections to annex land to the Town was later enacted as Ordinance 273). This is therefore not a case covered by Section 31-11-111(2), in which the legislative body of the Town could choose whether to submit the annexation question to the voters.

Had Ordinance 273 been adopted directly by the Board of Trustees, and not imposed upon the board by a voter initiative, this election might be covered by Section 31-11-111(2). In that case the Board of Trustees would have chosen to submit all annexations to a vote of electors. In the present case, however, the voters, not the Board of Trustees, decided to submit annexation issues to a vote. This was thus not a question submitted to a vote of registered electors by the Board of Trustees as contemplated by Section 31-11-111(2).

The Administrative Law Judge therefore concludes that Section 31-11-111 provides for two types of municipal elections: initiative and referenda elections governed

by Sections 31-11-104 and 105, C.R.S. (Section 31-11-111(1)); and any other ordinance, resolution or other question that the legislative body of a municipality chooses to submit to the voters (Section 31-11-111(2)). The annexation election in this case fell into neither of these categories.¹

5. The purpose of Section 117 of the FCPA is to prohibit governments and their officials from spending public funds to influence the outcome of campaigns for ballot issues. *Colorado Common Cause v. Coffman*, 85 P.3d 551 (Colo. App. 2003) (cert. granted March 1, 2004). Even assuming that Kraemer's letter improperly promoted his point of view at public expense, the remedy would lie elsewhere than in the FCPA.² The jurisdiction of the Administrative Law Judge is limited to alleged violations of specifically identified sections of Article 28 of the Colorado Constitution or the FCPA. Colo. Const., article XXVIII, sec. 9(2)(a). Although Section 117 of the FCPA is one of the provisions within the jurisdiction of the Administrative Law Judge under this constitutional provision, the Town's September 28, 2004 annexation election did not fall within Section 117. Therefore, this complaint must be dismissed.

CONCLUSIONS OF LAW

1. The jurisdiction of the Secretary of State and the Administrative Law Judge is limited to alleged violations of specifically identified sections of Article 28 of the Colorado Constitution or the FCPA. Colo. Const., article XXVIII, sec. 9(2)(a). One of those specifically identified sections is Section 117 of the FCPA.

2. The prohibition in Section 117 of the FCPA against the expenditure of public funds to urge voters to vote in favor of or against a ballot issue applies only to four specific types of elections. Section 1-45-117(1)(a)(I), C.R.S. (2004). The September 28, 2004 annexation election was not one of the elections to which Section 117 applies.

3. Because the annexation election was not covered by Section 117 of the FCPA, or any other provision of the FCPA or Article 28 of the constitution, the facts established at the hearing do not constitute a violation of any law over which the Secretary of State or Administrative Law Judge have authority. The complaint therefore must be dismissed.

1. The Town also argues that the September 28 annexation election was not held pursuant to Section 31-11-111, C.R.S. because it was conducted pursuant to the Municipal Annexation Act of 1965, Section 31-12-101 *et seq.*, C.R.S. Because the Administrative Law Judge has concluded that the election was not conducted under Section 31-11-111, it is not necessary to decide whether the election was also held under the authority of the Municipal Annexation Act.

2. There may be prohibitions against the use of public funds to promote a ballot issue other than those found in Section 117 of the FCPA. See, e.g., *Mountain States Legal Foundation v. Denver School District No. 1*, 459 F. Supp. 357 (D. Colo. 1978).

AGENCY DECISION

The complaint of Frank Grimaldi against the Town of Mead is dismissed.

DATED: December _____, 2004.

MARSHALL A. SNIDER
Deputy Chief Administrative Law Judge

CERTIFICATE OF SERVICE

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

Richard E. Samson, Esq.
255 Weaver Park Road, Suite 200
P.O. Box 1079
Longmont, CO 80502

Frank Grimaldi
P.O. Box 14
Longmont, CO 80502-0014

William Hobbs
Deputy Secretary of State
1560 Broadway
Suite 200
Denver, CO 80202

on this ____ day of December, 2004.

Administrative Assistant

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