

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

CASE NO. OS 20040031

**AGENCY DECISION DISMISSING COMPLAINT WITH PREJUDICE AND IMPOSING
ATTORNEY FEES**

**IN THE MATTER OF THE COMPLAINT FILED BY DOUGLAS BRUCE REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY SCHOOL
DISTRICT 11 AND THE BOARD OF EDUCATION OF SCHOOL DISTRICT 11,**

Defendants.

This is a complaint under the Fair Campaign Practices Act ("FCPA"), Section 1-45-101, C.R.S. Hearing commenced February 16, 2005 as agreed to by the parties at the offices of Defendants' counsel. Complainant represented himself. Eric Bentley, Esq. and Brent Rychener, Esq. appeared on behalf of the Defendants. After oral argument on the motion, the Administrative Law Judge ("ALJ") granted Defendants' motion to dismiss with prejudice. The reasons therefore are set forth below. Following the hearing, the Defendants moved for attorney fees. This request is granted, also as set forth below.

Background

The Complaint and the Parties

On October 26, 2004, Douglas Bruce ("Complainant") filed with the Secretary of State a complaint against Norman Ridder, Glenn Gustafson and Frank Bernhard who are employees of the El Paso County School District 11. The complaint is short enough to set out its principal allegations:

This letter is a complaint against the illegal conduct of D-11 employees. For example, I went to an evening meeting at Jenkins Middle School last week conducted by D-11 employees Glenn Gustafson and Frank Bernhard that was designed to show the need for two ballot issues, 3-F and 3-G. This was a clear violation of 1-45-117

Mr. Gustafson admitted to me the display ad in the local daily paper was paid with public funds. The school utilities and staff time were paid with public funds, as were the charts, slides, and other visual aids used. The presentation was completely one-sided in favor of the measures. It also

expressly solicited public questions in violation of the exception in section 117. Only reasons to vote for 3-F and 3-G on the November ballot were given. The presenters were not policy makers in D-11. The ballot title had been set over a month earlier. I complain of this and any similar meetings or costs after ballot titles were set.

...

I am also told that D-11 has printed, after the ballot title was set, and at public expense, large quantities of campaign material for the proponents of the ballot issues. I object to that as well, and make that illegal action and theft of public funds part of my complaint.

I have also seen a pro 3-F and 3-G presentation run repeatedly on D-11 cable television. No criticism or balance was included. That also violates the FCPA and 1-45-117.

The Secretary of State referred the complaint to an ALJ of the Division of Administrative Hearings ("Division") as provided in Colo. Const. art. XXVIII, Section 9(2)(a).

On December 29, 2004, the ALJ granted the Motion to Dismiss of the then Defendants Ridder, Gustafson and Bernhard on the grounds that they were not subdivisions of the state. Section 1-45-117 applies only to public bodies and not to individuals. However, counsel for the Defendants agreed to the substitution of their clients: School District 11 and the Board of Education of School District 11 in its official capacity, as Defendants.

The January 7, 2005 Order Following Informal Prehearing Conference

On January 7, 2005, an informal prehearing conference was held by telephone before the ALJ. That same day the ALJ issued an Order setting the hearing for February 16 and 18, 2005 and providing for discovery. Both parties consented to having the hearing on these dates. Per the Order, the parties were to file by January 14, 2005 a response, along with any objections to the outstanding discovery of the other party. Both parties were to file any reply by January 21, 2005. The ALJ also ordered the Defendants to give the Complainant certain items Defendants had voluntarily agreed to provide by January 10, ahead of the January 14, 2005 deadline.

Complainant's January 12, 2005 Motion to Extend Time of Objection and Objection

Complainant then moved on January 12, 2005 that he not be required to abide by the January 14 deadline that had been ordered January 7. Instead, he moved that he be relieved from responding to discovery until 14 days after Defendants had complied, to his satisfaction, with their discovery obligations. Complainant stated that he was too busy to go through the documents that had already been provided January 10. Nevertheless, he was apparently certain that Defendants had not complied with his

discovery request and would not two days away on January 14. Complainant asked the ALJ to order the Defendants to provide to the ALJ the same material provided to him January 10 so that the ALJ could go through the documents himself and determine what Complainant would regard as missing.

Defendants made their January 14, 2005 response to Complainant's discovery. Complainant has never objected to the sufficiency of this response.

As Complainant had not filed a response by the January 14 deadline other than his January 12 pleading, Defendants moved to compel on January 21, 2005.

The January 25, 2005 Order Regarding Discovery

On January 25, 2005, the ALJ issued an Order Regarding Discovery. The Order denied Complainant's motion to extend the January 14 deadline for him only. The Order gave Complainant until January 28 to respond to the Motion to Compel.

On January 31, 2005, Complainant filed a pleading stating that he had complied with Defendants' discovery requests. Significantly, Defendant did not object to the scope of the matters sought by the Defendants.

The February 4, 2005 Supplemental Memorandum in Support of the Motion to Compel

On February 4, 2005, Defendants filed a Supplemental Memorandum in Support of the Motion to Compel. The Supplemental Memorandum detailed Defendants' discovery requests made December 18, 2004 and Complainant's January 31, 2005 response. The Supplemental Memorandum asserted that Complainant's responses were inadequate.

Defendants' Interrogatory 1 asked:

Please describe in detail every action or incident by any Defendant that you contend constitutes a violation of the [FCPA] in this case.

To this the Complainant responded:

All those actions and incidents, and each of them, detailed to in defendants' written compliance with complainant's discovery requests, including documents, videos, charts, and all other material provided.

Defendants' Interrogatory 3 asked:

Please list all documents that you contend contain statements in violation of the Act in this case.

To this the Complainant responded:

All documents, and each of them, detailed to in defendants' written compliance with complainant's discovery request, as

well as the Gazette display ad for the Jenkins Middle School meeting.

Defendants' Interrogatory 4 asked:

For each document identified in response to Interrogatory No. 3 above, please identify each statement therein that you contend violates the Act.

To this the Complainant responded:

Each statement in each document provided in defendants' written compliance with complainant's discovery request that refers to or tends to prove an expenditure of D-11 funds on, or advocacy or description of, the capital projects and/or the ballot issues, or any other campaign acts between the time of ballot title setting and the election.

The Audiotape of the Jenkins Middle School Meeting

Defendants' Request for Production No. 4 asked for:

Any audiotapes, videotapes, or any other recordings of any presentation by any Defendant that you contend in this case is in violation of the [FCPA]. This includes any recordings in the possession of any person who has provided advice or support to you in this action.

This request requires some explanation. Complainant had sent an e-mail to Defendants' counsel November 11, 2004. In it he told Defendants that District 11 Board of Education member Eric Christen had a tape of the October 2004 meeting at Jenkins Middle School that Complainant believed was evidence of a FCPA violation. Although Christen is a member of the District 11 Board of Education, he is aligned with Complainant in this matter, along with another Board of Education member Craig Cox.

On January 6, 2005 or earlier, Defendants' counsel asked Complainant for a copy of the tape. On January 6, Complainant said that he didn't have the tape and that since Christen was a member of District 11 Board of Education, Defendants should get the tape from Christen. On January 9, 2005, in response to an e-mail, Christen told Defendants' counsel that *Complainant* had the tape. By January 9, at the latest, Complainant did have the tape.

In his January 31, 2005 response to Defendants' Request for Production No. 4, Complainant stated in pertinent part that: "The audio tape by defendant Christen is already in defendants' constructive possession." By this Complainant meant that because Christen was a member of the District 11 Board of Education, the tape was therefore in the possession of District 11. However, Christen himself was never a defendant. And in any event, Christen did not have the tape as of January 9, 2005.

On February 4, 2005, Defendants' counsel again asked Complainant for the tape or a copy so that it could be transcribed, but Complainant refused. Sometime around

February 4, 2005, Complainant then examined the tape for the first time. It was then that he discovered the tape was a micro-cassette tape. Since Complainant does not own a micro-cassette player, he did not listen to the tape and has never listened to the tape. Sometime after February 4, 2005, the Complainant provided the tape to the Defendants.

The February 7, 2005 Order Granting in Part Motion to Compel

On February 7, 2005, the ALJ granted the Motion to Compel in part. The ALJ determined that Complainant's answers were insufficient. The ALJ granted the request that Complainant answer Defendants' Interrogatory No. 1. Complainant was ordered to respond with specificity, listing separately each action (*i.e.*, specific statements and expenditures) that Complainant contended violated the FCPA.

The ALJ also granted the request that Complainant answer Defendants' Interrogatory No. 3. Complainant was ordered to list, in good faith, *specifically* each separate document he believed contained statements in violation of the Act.

In relation to Interrogatory No. 4, Complainant was ordered to identify each statement in each document that he contended violated the FCPA. In the case of audiotape or videotape, Complainant was ordered to transcribe that portion of the videotape and audiotape that he contended violated the FCPA.

Complainant was also ordered, in accordance with Defendants' Request for Production No. 3, to produce a copy of each document with every statement underlined that Complainant contended violated the FCPA. Complainant was further ordered to provide to the Defendants the audiotape of the meeting at Jenkins Middle School.

Complainant's February 10, 2005 Response to the Order Granting in Part the Motion to Compel

Complainant failed to comply with the Order Granting in Part the Motion to Compel. Complainant provided no response at all to Interrogatory No. 1. Thereby, he failed to list as ordered, any specific statements or expenditures he believed violated the FCPA.

In response to Interrogatories 3 and 4, Complainant took a 484-page notebook of exhibits that Defendants had provided to him and highlighted almost every single page. Most of this notebook contained the School District's Capital Plan, which set out the needs of the School District. He also highlighted correspondence from the Defendants to him. This correspondence was simply cover letters from Defendants' counsel describing documents they were forwarding. Although Complainant highlighted almost every page of the notebook, the vast majority of the documents highlighted were purely factual statements, lists of costs and photographs of deficiencies.

This response was also in violation of the ALJ's February 7, 2005 order regarding Interrogatories 3 and 4. The ALJ ordered the Complainant to list, in good faith, *specifically* each separate document he believed contained statements in violation of the Act. As the highlighted materials were purely factual and were simply Defendants' own documents returned to them, this response did not provide a good faith response

setting out documents and statements in violation of the FCPA. A violation of the FCPA requires the expense of public money to *urge* electors to vote in favor or against any local ballot issue. Section 1-45-117(1)(a)(I)(B), C.R.S.

Complainant also provided no transcript of any audio or videotape, although he had endorsed the audiotape of the Jenkins Middle School meeting as an exhibit in his prehearing statement discussed below. (An audiotape he had never listened to.)

Defendants' February 14, 2005 Request for Remedies for Complainant's Violations of ALJ's Order Granting in Part Motion to Compel

On February 14, 2005, Defendants moved that the complaint be dismissed and that fees and costs be assessed per C.R.C.P. 37(b)(2) for Complainant's failure to comply with the Order Granting in Part Motion to Compel.

Other Pretrial Disclosures

The discovery issues in this case are better understood in the context of other disclosures required by the ALJ. In his January 7, 2005 order, the ALJ also ordered the parties to file a list of witnesses, experts and exhibits in accordance with Rule 13C of the Rules of the Division of Administrative Hearings, 20 days prior to the February 16, 2005 hearing date. In his January 12, 2005 pleading, Complainant moved to have all such disclosures continued 30 days or more after all discovery requests by both sides had been honored. The ALJ denied this request in the January 25, 2005 order.

Complainant filed his Prehearing Statement January 31, 2005, four days late. The Complainant first endorsed as witnesses the first eleven witnesses endorsed by the Defendants in their timely filed prehearing statement. The endorsements of the Defendants did not indicate how these witnesses would testify for the *Complainant*. Other than these witnesses, the Complainant identified two witnesses, school board members Christen and Cox. These witnesses were endorsed to discuss "Regarding Jenkins Middle School meeting; his lack of authorization for expenditures shown by the evidence; analysis of the evidence." None of these endorsements provided any particularity as to what specific conduct the Complainant alleged was a violation of the FCPA.

As to exhibits, Complainant again endorsed all the exhibits endorsed by the Defendants. Complainant only endorsed two exhibits himself. The first was the Gazette display notice referenced in his complaint. The second was the cryptic: "Material provided by defendant [sic] Christen which is in the constructive possession of defendants' counsel, including but not limited to an audiotape of the Jenkins Middle School meeting."

The February 16, 2005 Hearing

As stated above, the hearing was held February 16, 2005. The ALJ orally granted the motion to dismiss of February 14, 2005. Defendants were also provided five days to support their request for fees and costs. Complainant did not respond to a question from the ALJ whether he wanted time to respond. Rather, he opined that the ALJ had lost jurisdiction by granting the motion to dismiss and left the hearing room.

Post Hearing Motions

On February 22, 2005, the Defendants filed a Defendants' Memorandum in Support of Motion for Expenses, Including Attorney's Fees and Interest. Although Complainant did not respond to a question from the ALJ as to whether he wanted to file a response, Complainant did file a response March 4, 2005. Defendants filed a Reply Brief March 8, 2005.

Attached to the Memorandum in Support of Motion for Expenses is an affidavit from Mr. Bentley. The affidavit attests that Mr. Bentley and Mr. Rychener charged the Defendants' the reduced rate of \$160 per hour and that the paralegal Kimberly L. Hans charged the reduced rate of \$70 per hour. The Defendants request a total of \$6,810 related to the many motions regarding discovery and pretrial disclosure discussed above. Of this amount, the ALJ determines that \$3,480 is directly attributable to Complainant's failure to comply with the February 7 Order Granting in Part Motion to Compel. A spreadsheet attached to the motion sets out these expenses in detail.

In his March 4 Complainant's Answer to Motion for Expenses, Attorney Fees, Etc., Complainant argues that complaints per Section 1-45-117 do not provide for attorney fees. This is incorrect. Complaints per Section 1-45-117 are to be referred to an Administrative Law Judge. Colo. Const. art. XXVIII, Section 9(2)(a). Any proceeding in which opportunity for agency adjudicatory hearing is required under the state constitution is to be held in conformance with Section 24-4-105. Section 24-4-105(2)(a), C.R.S. This is such a proceeding. Section 24-4-105(4), C.R.S. permits the "award of attorney fees for abuses of discovery procedures or as otherwise provided under the Colorado rules of civil procedure."

Complainant cites the language in Colo. Const. art X, Section 20, the Taxpayer's Bill of Rights. Part (1) of that Section 20 provides that enforcement suits may be filed to enforce the Section. That Section 20 provides that a district, defined as a state or local government, may not obtain attorney fees, unless the claim is deemed frivolous. Prior to Complainant's March 4 pleading, Complainant never identified this case as such an action. This case is not such a case and any such case, as a civil matter, would be filed in the civil courts.

As he did at the hearing, Complainant in his March 4 pleading argues that Defendants were dilatory in their discovery responses. However, Defendants supplied discovery by all the deadlines set by the ALJ. Complainant has never objected to the sufficiency of Defendants' discovery responses and he never himself moved to compel. It is true that on January 12, 2005, Complainant filed a pleading *anticipating* that that the responses would be insufficient. He never objected, though, once the responses were made.

Basis for the Sanction of Dismissal With Prejudice

Defendants in their motion to dismiss sought dismissal of Complainant's complaint based on Complainant's repeated refusal to respond to discovery. The ALJ granted the motion for the reasons set forth below.

Colorado Rule of Civil Procedure 37(b) provides that if a party fails to obey an order to provide discovery, the court may make such orders as are just, including: "(B) an order refusing to allow the disobedient party to support ... claims ... or prohibiting him from introducing designated matters in evidence;" and "(C) An order ... dismissing the action" Orders per C.R.C.P. 37(b) are appropriate in administrative proceedings. *Norton v. Colorado Board of Medical Examiners*, 821 P.2d 897, 902 (Colo. App. 1991).

Complainant has consistently failed to provide meaningful responses to discovery and has failed to comply with the discovery orders of the ALJ. He has failed to provide any specificity or focus to his claim that the Defendants violated the FCPA. Rather than set out what he believes the Defendants have done unlawfully, Complainant has merely referenced Defendants' own responses to discovery. Effectively, Complainant's responses prevented Defendants from learning the nature of Complainant's claim or preparing for hearing. Dismissal is the only appropriate remedy. A lesser sanction of prohibiting Complainant from supporting certain claims, as described in C.R.C.P. 37(b)(2)(B), is not feasible in this case. Because Complainant has refused to identify actions, statements and documents he relies on, either in his complaint, in discovery or in his pretrial disclosures, his complaint is too amorphous to partition.

Although Defendants may have had a general idea of what they were accused of, they had a right through discovery to ask for and be provided with specific information about what they were accused of doing wrong, including what statements they made and what documents they wrote that Complainant believed violated the FCPA. The Defendants had the right to this information in order to defend themselves, to know what witnesses to call and what documents to offer in defense. The Complainant's non-responsive and vague discovery responses have provided essentially no indication of how he believes Defendants violated the FCPA. His pretrial disclosures and his complaint did not remedy this. Instead, Complainant appears to regard his responsibility to end with requiring Defendants to produce documents responsive to his own broad discovery requests.¹

Irrespective of Complainant's own understanding, the fact remains that Defendants had asked for discovery in this case. Complainant did not object to the scope of the discovery, but nevertheless did not provide it. The requests of Defendants, as set out above, were reasonable. Defendants moved to compel and Complainant did

¹ That Complainant feels he has no responsibility to provide evidence himself is most dramatically evidenced by the incident concerning the tape of the Jenkins Middle School meeting. Complainant falsely stated in his January 31, 2005 responses that the Jenkins Middle School audiotape was in the possession of the Defendants, when it was not and when Complainant knew it was not.

not object. The ALJ granted the motion and ordered Complainant to comply. Complainant refused to comply. His refusal goes to all aspects of his complaint. The ALJ therefore concluded that the sanction of dismissal was appropriate per C.R.C.P. 37(b)(2)(C).

Attorney Fees

The ALJ concludes that an award of attorney fees is appropriate in this case, as Complainant failed to comply with the February 7, 2005 Order Granting in Part Motion to Compel. The sanction in this case should specifically relate to Complainant's failure to comply with that Order. Such sanctions are permitted by C.R.C.P. 37(b) and by Section 24-4-105(4), C.R.S.

Per the spreadsheet, the ALJ has identified \$3,480 of Defendants' expenses he views as directly related to Complainant's failure to comply with the Order. Specifically these are all the expenses for the preparation of the February 14, 2005 Request for Remedies, which included a motion to dismiss under C.R.C.P. 37(b). Also included in this calculation is the preparation of the February 22, 2005 Memorandum in Support of Motion for Expenses. Referring to the spreadsheet, these are all the expenses related to the dates February 11, 2005 to February 22, 2005. The ALJ has not included in the \$3,480 calculation the time of the February 16, 2005 hearing before the ALJ, which the Defendants would have had to attend in any case. Also not included are any expenses for the paralegal Ms. Hans as Section 24-4-105(4) speaks only of "attorney fees."

The \$3,480 amount is reasonable. Despite this, the ALJ concludes that a sanction in excess of \$1,000 is not warranted under the facts of this case. Any sanction greater than this amount might have the effect of chilling the ability of private citizens from making complaints under the FCPA. Colo. Const. art XXVIII, Section 1 sets out a finding and declaration of the people of the state of Colorado that the interests of the public are best served by strong enforcement of campaign finance requirements. Such enforcement could be thwarted if private citizens feared the imposition of fines for failure to comply with the rules of discovery, rules they may be unfamiliar with.²

For these same reasons, the ALJ declines to impose interest as is requested by Defendants. On the other hand, the ALJ recognizes that a \$1,000 sanction may be meaningless if the cost of collecting the amount exceeds the sanction, as could easily occur in the case of a \$1,000 fine. For this reason, the ALJ grants the request of Defendants that they be permitted all costs and attorney fees related to enforcement and collection of the \$1,000 sanction.

² The ALJ notes that as a former attorney, prosecutor and frequent complainant in FCPA cases, Complainant is likely to be more familiar with FCPA hearing requirements than some other FCPA complainants. See footnote 4, page 8 as well as exhibit C of Defendants' February 14, 2005 Request for Remedies. See also, Paragraph 4 of Complainant's March 4, 2005 pleading. Nonetheless, the risk of thwarting the private citizen enforcement mechanism of the FCPA outweighs the imposition of a greater amount of attorney fees, even in Complainant's case.

The Effect of the Order at Hearing Granting the Motion to Dismiss

There is no authority for the Complainant's argument at hearing and in his March 4 pleading that the ALJ lost jurisdiction when he orally granted the motion to dismiss. Obviously, the ALJ must have time to issue a written decision after granting a motion to dismiss at hearing. Additionally, a request for attorney fees as a sanction under Section 13-17-101, C.R.S. may be requested by motion following entry of judgment. See *Bakehouse & Associates, Inc. v. Wilkins*, 689 P.2d 1166 (Colo. App. 1984).

AGENCY DECISION

It is therefore the Agency Decision that the complaint is dismissed *with prejudice*. Complainant shall pay to Defendants \$1,000 for their attorney fees. This decision is final and subject to the review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S. Colo. Const. art XXVIII, Section 9(2)(a).

DONE AND SIGNED

March _____, 2005

MATTHEW E. NORWOOD
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **AGENCY DECISION DISMISSING COMPLAINT WITH PREJUDICE AND IMPOSING ATTORNEY FEES** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Douglas Bruce
Box 26018
Colorado Springs, CO 80936

Eric Bentley
Brent Rychener
Deborah S. Menkins
Holme Roberts and Owen, LLP
90 South Cascade Ave., Suite 1300
Colorado Springs, CO 80903

and to

William A. Hobbs
Deputy Secretary of State
Department of State
1560 Broadway, Suite 200
Denver, CO 80203

on this ____ day of _____, 2005.

Secretary to Administrative Law Judge