

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

CASE NO. OS 20050021

AGENCY DECISION DISMISSING COMPLAINT

**IN THE MATTER OF THE COMPLAINT FILED BY MARIAN L. OLSON REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE CITY OF
GOLDEN AND THE GOLDEN CITY COUNSEL.**

On August 4, 2005, the Complainant filed the complaint in this matter with the Secretary of State, per Colo. Const. art. XXVIII, Section 9(2)(a). As set out in that section, the Secretary of State referred the matter to an Administrative Law Judge ("ALJ"). Hearing was held August 19, 2005. The Complainant, who is not an attorney, represented herself. David S. Williamson, Esq. and William P. Hayashi, Esq. represented both Defendants.

On August 15, 2005 and again on August 17, 2005, the Complainant asked to continue the August 19, 2005 hearing. The Defendants were contacted by telephone by staff of the Office of Administrative Courts and indicated they opposed this motion.

On August 17, 2005, the Defendants filed a Motion to Dismiss. ALJ Kathleen Muramoto reviewed the motion to continue. She determined to have the matter of the continuance and the Motion to Dismiss brought up at the hearing scheduled for August 19, 2005; she did not continue the hearing.

The Complaint

The pertinent portion of Complainant's complaint is as follows:

Pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution, I am hereby filing a written complaint alleging that the City of Golden is violating Article XXVIII by not following it with respect to the November 2005 election.

In November of 2004, the City of Golden ("Golden") adopted Ordinance No. 1682 enacting Chapter 1.05 of the Golden Municipal Code (GMC) pertaining to local election campaign finance.

On or about August 2, 2005, Golden commenced distributing campaign finance guidance, based on Ordinance 1682, to potential city council candidates for election in November 2005. The election is a mail ballot election

coordinated with Jefferson County and administered by the Jefferson County Clerk and Recorder. The ballot will include state-wide issues and is a matter of state-wide concern. Article XXVIII of the Colorado Constitution is the controlling campaign finance law for such an election.

Applying Ordinance 1682 to a coordinated election is unconstitutional. Among other things, Ordinance 1682, "Political Committee" is defined to include support or opposition to candidates, ballot issues, ballot questions or issues ... There is no "issue committee" defined. The Candidate Affidavit does not require familiarity with Article XXVIII or Article 45. Such application deprives Golden citizens of equal protection under the law.

Discussion

"Ripeness requires that there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication." *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002). Until an actual conflict exists, there is no case or controversy for a Court to resolve. *See Tippett v. Johnson*, 742 P.2d 314 (Colo. 1987). Here no case or controversy exists.

The complaint is that the Defendants violated Article XXVIII "by not following it with respect to the November 2005 election." The complaint lists three particulars in which Golden's ordinance 1682 deviates from Article XXVIII. The Complainant notes the definition of "political committee" in the ordinance. Although Complainant does not say so in the complaint, this definition is different from the definition appearing in Article XXVIII, Section 2(12). She notes that the ordinance has no definition of issue committee. Article XXVIII, Section 2(10) has such a definition. The complaint alleges that the Candidate Affidavit required by the ordinance does not require familiarity with Article XXVIII or with Article 45 (the Fair Campaign Practices Act ("FCPA") at Section 1-45-101, C.R.S.).

The Complainant seeks an order that Golden must comply with Article XXVIII and the FCPA in the November 2005 election. This election deals with local and state-wide concerns. There is, apparently, a dispute between the parties as to whether the provisions of Article XXVIII or the FCPA apply to home rule cities such as Golden. The position of the Defendants is that the provisions do not in the case of elections regarding city offices and local ballot issues. The Defendants rely on Section 1-45-116, C.R.S. and an opinion of the Attorney General, Op. Att'y Gen. No. 03-1 (2003).

It is based on this view that the Defendants filed their Motion to Dismiss. The Defendants viewed the complaint as requiring a review of the constitutionality of the Uniform Election Code of 1992, Section 1-1-101, C.R.S. and the FCPA, Section 1-45-101, C.R.S. Defendants argued that the ALJ, sitting on behalf of the Secretary of State, could not declare unconstitutional the Secretary of State's enabling legislation at

Section 1-45-116, C.R.S. The Defendants rely on *Clasby v. Klapper*, 636 P.2d 682 (Colo. 1981).

Whatever the merits of this argument, it is premature in this case to entertain it. ALJ's, like courts, should not give advisory rulings. Rather, they should "decide actual controversies by a judgment which can be carried into effect, and not . . . to declare principles or rules of law which cannot affect the matter in issue before it." *Barnes v. District Court*, 199 Colo. 310, 312, 607 P.2d 1008, 1009 (1980). Nowhere in the complaint is there any allegation of a *specific* instance of a violation of Article XXVIII or the FCPA. At the most, Complainant's allegation is that Golden's ordinance gives wrong advice as to the scope of the law. This is insufficient. If, in fact, Golden (and the former Attorney General) are wrong about the scope of Article XXVIII, that fact has no legal significance until there is an actual case of a violation of the provisions of Article XXVIII. Only at that point would it be proper to decide the issue of whether Article XXVIII applies to home rule cities. To hold a hearing now would only serve the purpose of declaring what law would apply in the case of a hypothetical violation.¹

Based on the discussion at hearing of the ALJ's concerns over the absence of an actual case or controversy in this matter, the Defendants at hearing moved to dismiss this case on the grounds that there was no allegation of a violation of the Constitution or the FCPA. The ALJ granted the motion.

At the hearing, the Defendants asked for leave to file a request for attorney fees. The request was granted and Defendants filed a motion on September 1, 2005 seeking \$2,659.50 in attorney fees. An exhibit itemized this amount. Although the Defendants note in their motion that Complainant subpoenaed many Golden city officials to the hearing, no attorney fees or costs are sought in relation to these subpoenas. On the same day, Complainant filed a response.

The Request for Attorney Fees

Applicable Law

As a basis for the request for attorney fees, the Defendants rely on that portion of Section 9(2)(a) of Article XXVIII that provides: "The prevailing party in a private enforcement action shall be entitled to reasonable attorneys fees and costs."

This provision is inapplicable to this case. This reference applies to private enforcement actions where the Secretary of State fails to file an enforcement action within thirty days of the decision of an ALJ. *See id.*

The Defendants also rely on the following language that appeared in Section 1-45-111.5, C.R.S. (2003): "(2) The prevailing party in a private action brought to enforce

¹ The Department of State, like every state agency, is required to have a procedure for entertaining petitions for declaratory orders. Section 24-4-105(11), C.R.S. This avenue need not be explored, though, as the Secretary of State has stated in her own rules that Article XXVIII and the FCPA do not apply to home rule cities. Rule 7, 8 CCR 1505-6.

the provisions of Article XXVIII of the State Constitution or of this Article shall be entitled to the recovery of such party's reasonable attorney's fees and costs." This language, particularly as it discussed "the prevailing party in a private action brought to enforce," also related to the same private enforcement actions where the Secretary of State failed to act.

However, the quotation provided by the Defendants is not the current law. Effective June 1, 2005, Section 1-45-111.5, C.R.S. was modified to apply to "any action brought to enforce the provisions of article XXVIII" In order to assess attorney fees under this new language, the ALJ must conclude that:

[T]he action, or any part thereof, lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure. For purposes of this subsection (2), "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious."

Corsentino v. Cordova, 4 P.3d 1082 at 1091 (Colo. 2000) provides:

We have recognized that amendments to a statute either clarify the law or change it. See *Douglas County Bd. of Equalization v. Fidelity Castle Pines, Ltd.*, 890 P.2d 119, 125 (Colo. 1995). There is a presumption that the legislature intends to change the law when it amends a statute. See *id.* This presumption can be rebutted by showing that the legislature only intended to clarify an ambiguity with the amendment. See *id.*

Based on the presumption discussed in *Corsentino*, the ALJ concludes that the legislature intended to change Section 1-45-111.5. Based on the change in language from "a private action brought to enforce" to "any action brought to enforce the provisions of article XXVIII" (emphasis added), the ALJ concludes that the change was meant to expand the ability of the ALJ to impose attorney fees and costs to any case brought under Article XXVIII or the FCPA.

Therefore, while the version of the authority cited by the Defendants does not support their request for attorney fees, the current version, the version applicable at the time of this case, does.

Application of the Law to This Case

The language in Section 1-45-111.5, C.R.S. dealing with "delay," or "harassment" or "abuses of discovery" does not apply the facts in this case. The lack of "substantial justification" is the only pertinent basis to impose attorney fees. While the ALJ agreed

with the Defendants that the complaint should be dismissed, the ALJ and the Defendants were not really in accord as to the particular legal basis for the dismissal. This difference undermines the idea that there was an obvious, objective deficiency in the complaint that would support a conclusion that it lacked "substantial justification."

Also, the imposition of a sanction in this case might have the effect of chilling the ability of private citizens from making complaints under the FCPA. Article XXVIII at 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. The mechanism for such enforcement is the filing of complaints by "any person" as set out in Section 9(2)(a). Enforcement could be thwarted if private citizens feared the imposition of fees in the event their complaint is later judged not legally sufficient.

Complainant is not an attorney. Here there is insufficient basis to ascribe to Complainant the level of sophistication that would warrant the potential chilling of the complaint process by the imposition of attorney fees.

AGENCY DECISION

It is therefore the Agency Decision that this matter be dismissed as failing to allege a genuine case or controversy suitable for adjudication. No costs or attorney fees are imposed. 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

September 12, 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** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

David S. Williamson
1650 30th Street, Suite 103W
Boulder, CO 80301

Marian L. Olson
203 Iowa Drive
Golden, Colorado 80403

and to

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

on this ____ day of _____, 2005.

Technician IV