

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

CASE NO. OS 20050026

AGENCY DECISION DISMISSING COMPLAINT

**IN THE MATTER OF THE COMPLAINT FILED BY BILL SMITH REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY MAYOR STEVE
BURKHOLDER, CITY MANAGER MIKE ROCK, AND COUNCILMAN BOB MURPHY,**

Defendants.

Background

On October 20, 2005, Bill Smith, the Chairman of the Lakewood T Party, filed a complaint on behalf of the Lakewood T Party against City of Lakewood Mayor Steve Burkholder, City Manager Mike Rock, and Councilman Bob Murphy. The complaint alleges that the individual Defendants violated Section 1-45-117 of the Fair Campaign Practices Act ("FCPA") concerning a November 1, 2005 election on issue 2A. This issue 2A authorized a sales tax increase in the city of Lakewood.

On October 24, 2005 the Colorado Secretary of State referred this complaint to the Office of Administrative Courts pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution. In accordance with Section 9(2)(a)'s requirement that the hearing be held in 15 days, this matter was set for hearing November 7, 2005.

On November 1, 2005, the Defendants filed a Motion to Continue the case for up to 30 days. Section 9(2)(a) provides that defendants "shall" be granted an extension of time of up to thirty days upon request. Consequently, on November 2, 2005 the ALJ issued an Order Vacating Hearing and Notice to Set, providing for a setting conference on November 15, 2005.

On November 4, 2005, the Defendants filed a Motion for a More Definite Statement and a Motion to Dismiss Mayor Steve Burkholder, City Manager Mike Rock, and Councilman Bob Murphy from the Complaint. On November 14, 2005, Mr. Smith responded to these motions.

The Prehearing Conference

In light of the pending motions, Administrative Law Judge Matthew E. Norwood conducted a telephone prehearing conference at the November 15, 2005 setting conference. The parties were provided notice that the pending motions would be discussed at the prehearing conference. At the prehearing conference Mr. Smith appeared on behalf of the then Complainant Lakewood T Party. Roger Noonan, City

Attorney and Paul Kennebeck, Deputy City Attorney appeared on behalf of the Defendants. The prehearing conference was recorded on tape no. 9276.

Mr. Smith is not an attorney and so may not appear in this proceeding as a representative of the Lakewood T Party. *Colorado Board of Medical Examiners v. Boyle*, 924 P.2d 1113, 1119 (Colo. App. 1996). However, a non-attorney may represent himself as a Complainant. *Denver Bar Association v. Public Utilities Commission*, 154 Colo. 273, 391 P.2d 467, 472 (1964). The parties agreed that this proceeding would be restyled with Mr. Smith as the Complainant so that the matter could proceed. Therefore the caption of this Agency Decision Dismissing Complaint has been modified from that of earlier pleadings to show Mr. Smith, and not the Lakewood T Party, as the Complainant.

The Motion to Dismiss

The Defendants' Motion to Dismiss argues that Section 1-45-117 applies only to public bodies and not to individuals such as the currently named Defendants.

Section 1-45-117(1)(a)(I)(C) provides:

(1)(a) (I) No *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 any person to any public office, nor shall any *such entity* expend any public moneys from any source, or make any contributions, to urge electors to vote in favor of or against any:

...

(C) Referred measure, as defined in section 1-1-104(34.5);¹

....

[Emphasis added.]

In support of their Motion, the Defendants cite two Agency Decisions of the Secretary of State where this same issue has been decided against the Complainant: *In the Matter of the Complaint Filed by Douglas Bruce Regarding Alleged Violations of the Fair Campaign Practices Act by Colorado Springs City Officials Lorne Kramer, Kathryn Young, Michael Anderson and Patricia Kelly; Colorado Springs City Council; City of Colorado Springs; and Does I-X*, OS 2003-005, decided July 23, 2003 (Schulman, ALJ) and *In the Matter of the Complaint Filed by Douglas Bruce Regarding Alleged Violations of the Fair Campaign Practices Act by James Mullen and Does I-X*, OS 2000-008, decided October 31, 2000 (Snider, ALJ).

¹ By the Defendants' citation to 1-45-117(1)(a)(I)(C), the ALJ understands that the Defendants regard this as the applicable subsection, and not Section 1-45-117(1)(a)(I)(B) dealing with "local ballot issues." This distinction is not significant as the language in Section 1-45-117(1)(a)(I) applies equally to both subsections. These two subsections are the only ones applicable to elections such as the one at issue.

In both of these cases the ALJ dismissed the complaint against individual Defendants as the above language applies only to arms of the state.

More recently, the undersigned granted a similar motion to dismiss individual defendants in *In the Matter of the Complaint Filed by Douglas Bruce Regarding Alleged Campaign and Political Finance Violations by School District 11 Superintendent Norman Ridder, Glenn Gustafson, Frank Bernard, and Does I-XII*, OS 20050031, Order Granting Motion to Dismiss and Granting Motion to Amend, issued December 29, 2004.

As stated in the OS 20050031 order, Courts are to look first to the language of a statute in order to determine its meaning. *Colorado Common Cause v. Meyer*, 758 P.2d 153, 160 (Colo. 1988). Section 1-45-117 unambiguously applies only to public entities and not to individuals.

The Appellant relies on the case of *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*, OS 20020012, decided December 9, 2002 (Schulman, ALJ). In that case a complaint was allowed to proceed against Mayor Burkholder under Section 1-45-117. The pertinent part of that Section read the same then as it does now. Mayor Burkholder was found to have violated Section 1-45-117, but at the request of the Complainant in that case, no sanction was imposed. While it is true that the holding in that case is not consistent with the decisions in the three other cases discussed above, it does not appear that the issue of the application of Section 1-45-117 was raised in that case.

For the foregoing reasons, then, the motion to dismiss the individual defendants in this case: Mayor Steve Burkholder, City Manager Mike Rock, and Councilman Bob Murphy, is granted. As these individuals are the only Defendants complained against, the matter is dismissed in its entirety.

AGENCY DECISION

This dismissal constitutes final agency action and is subject to 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

November 17, 2005

MATTHEW E. NORWOOD
Administrative Law Judge