

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2005-0031

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY WILLIAM J. HARRIS REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY BIG SANDY
FIRE DISTRICT**

On November 28, 2005, Complainant William J. Harris ("Harris") filed a complaint with the Colorado Secretary of State against Big Sandy Fire District ("the Fire District"), alleging violations of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2005) ("the FCPA"), specifically, Section 1-45-117. The Secretary of State transmitted the complaint to the Colorado Office of Administrative Courts on December 1, 2005, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter December 15, 2005. The hearing was digitally recorded in Courtroom 1. Harris participated personally and represented himself. The Fire District was represented by Ken Moore, its secretary-treasurer, pursuant to Section 13-1-127(2), C.R.S. (2005) (under specified circumstances a closely held entity may be represented by an officer). The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Colo. Const., Art. XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2005).

ISSUE PRESENTED

The issue to be determined is whether the Fire District violated Section 1-45-117 of the FCPA by expending public funds or making contributions in connection with placing one or more signs on fire equipment urging a positive vote on a mil levy ballot issue in the November 2005 election.

FINDINGS OF FACT

1. Harris is a resident of the town of Simla, Colorado.
2. The town of Simla, Colorado, has a volunteer fire department known as the Simla Volunteer Fire Department, which provides volunteer fire and ambulance services for the town. In addition, a separate volunteer organization, known as the Big

Sandy Rural Fire Department, provides volunteer fire and ambulance services for the area immediately outside the town limits of Simla.

3. The Simla Volunteer Fire Department does not receive any funds directly from the town of Simla. However, the town of Simla does pay for propane and electricity for the firehouse that houses the equipment of the Simla Volunteer Fire Department, by making payments directly to the vendors. The Simla Volunteer Fire Department trucks are paid for with the use of donations and government grants from the State of Colorado and the Federal Emergency Management Agency. Additionally, the Simla Volunteer Fire Department receives funds by charging patients and insurance companies for ambulance runs.

4. The record contains no information concerning the funding sources for the Big Sandy Rural Fire Department apart from donations.

5. By means of a successful ballot issue in November 2004, the Big Sandy Fire District was created, with boundaries contiguous with those of the Big Sandy School District. The District was created to allow tax money to be raised through mil levies to fund fire protection efforts in the areas served by the two volunteer fire departments. Although it was the intent of the ballot issue to simultaneously create the Fire District and obtain voter approval within the Fire District for an initial mil levy, due to difficulties with the title of the measure, the mil levy portion of the measure was never certified. Consequently, the mil levy portion of the 2004 measure was not deemed to have been approved by the voters.

6. As a result of the confusion with the 2004 ballot issue, the Big Sandy Fire District was created in November 2004, but at least up until the November 2005 election received no mil levy funds or funds from any other source. Consequently, from November 2004 through at least the November 2005 election, the Big Sandy Fire District, although now an official entity, had no resources.

7. The record is unclear as to whether the Big Sandy Fire District, once it was able to raise money through a mil levy, was intended to supersede the Big Sandy Rural Fire Department and the Simla Volunteer Fire Department entirely or was only intended to be a funding source for those departments, which would continue to exist as independent entities. In any event, the 2004 mil levy measure was unsuccessful and following the November 2004 election no change occurred in the operation of the volunteer fire departments. The Simla Volunteer Fire Department and the Big Sandy Rural Fire Department continued to operate as separate entities with the same funding sources as previously. The newly-formed Big Sandy Fire District provided no funds to the volunteer fire departments because it had no funds or resources of any kind to distribute. Additionally, there is no evidence that the assets or equipment of the volunteer fire departments (for example, their fire trucks and ambulances) ever became the property of the Big Sandy Fire District following the November 2004 election or that the members of the volunteer fire departments became employees of the Fire District.

8. Because the November 2004 mil levy measure was unsuccessful, a new mil levy ballot measure was proposed for the November 2005 election and was ultimately successfully passed by voters in the Fire District.

9. On an undisclosed date in the fall of 2005, a parade was held in Simla in connection with the local school district's homecoming celebration. One or more of the fire trucks and/or ambulances belonging to the Simla Volunteer Fire Department took part in the parade.

10. In advance of the parade, the fire chief of the Simla Volunteer Fire Department made signs that stated: "Support your local fire department. Vote yes on November 1." The signs did not reference a ballot issue name or number. These signs were placed on one or more of the Simla Volunteer Fire Department's vehicles that participated in the parade. The signs were prepared by the fire chief using his own posterboard and markers. No public funds were expended to prepare the signs.

11. The record does not reveal whether the 2005 mil levy measure was a referred measure and if so, when the measure was referred to the voters.

12. The record does not reflect whether, at the time of the parade, the mil levy ballot issue was a local ballot issue that had been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that had had a title fixed pursuant to that section. Nor does the record reflect the date, if any, on which the ballot issue was submitted to have a title fixed or the date, if any, on which the title was in fact fixed.

13. The Big Sandy Fire District is a political subdivision of the State of Colorado.

14. The record does not reflect the organizational nature of the Simla Volunteer Fire Department or the Big Sandy Rural Fire Department except that they are volunteer associations. There was no evidence indicating that either department is an agency, department, board, division, bureau, commission or council of the State of Colorado or a political subdivision of the State of Colorado.

15. The record does not establish that the Big Sandy Fire District was responsible in any way for placing signs on fire or ambulance equipment in connection with homecoming parade, had any involvement in the decision to place the signs on the vehicles, approved such placement, or participated in the making or placement of the signs on the vehicles.

16. The record does not reflect whether any issue committee existed with respect to the November 2005 Big Sandy Fire District mil levy ballot issue.

DISCUSSION

Article XXVIII of the Colorado Constitution, adopted as an initiated measure by the voters of Colorado in 2002, in combination with the FCPA, together comprise Colorado's campaign finance law. Harris contends the Big Sandy Fire District violated these provisions as they relate to expenditures or contributions by public entities. Specifically, Harris maintains that by placing signs on fire/ambulance vehicles which urged a yes vote on the Fire District's 2005 mil levy ballot measure, the Fire District made an improper expenditure or contribution in violation of Section 1-45-117 of the FCPA.

In accordance with Section 9(1)(f) and 9(2)(a) of Article XXVIII of the Colorado Constitution, this proceeding is conducted pursuant to the provisions of Section 24-4-105, C.R.S. of the State Administrative Procedure Act. In such a proceeding, the proponent of the order bears the burden of proof. Section 24-4-105(7), C.R.S. In this case, Harris is the complaining party and therefore bears the burden of proof to establish a violation of Colorado's campaign finance law, as alleged in his complaint. It is clear (and undisputed) that the signs in question did urge electors to vote in favor of the 2005 ballot measure. However, because the ALJ concludes Harris has failed to establish the other elements necessary to prove the alleged violation, the ALJ determines no violation of Section 1-45-117 of the FCPA has been proved.

1. *Fire District's Alleged Responsibility for Alleged Violation.* Section 1-45-117(1)(a)(I) prohibits any "agency, department, board, division, bureau, commission, or council of the state" or any "political subdivision" of the state from "expend[ing] any public moneys from any source, or mak[ing] any contributions to urge electors to vote in favor or against" specified matters, including certain local ballot issues and referred measures.¹

¹ Specifically, Section 1-45-117(1)(a)(I) provides:

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:

(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.

Harris claims that the Fire District violated this section by placing signs on Simla Volunteer Fire Department vehicles that urged a yes vote regarding the 2005 mil levy. Although the evidence is undisputed that the signs in question urged a favorable vote on the proposal and the Fire District is a political subdivision of the state covered by the expenditure and contribution prohibitions of Section 1-45-117, Harris has failed to establish the Fire District, as opposed to the Simla Volunteer Fire Department or an individual member of that department, was responsible for placing the signs in question on the vehicles.

The evidence established that the fire chief of the Simla Volunteer Fire Department placed signs urging a yes vote on Simla Volunteer Fire Department vehicles in connection with the Big Sandy School District homecoming parade. However, the evidence did not establish that as a result of the 2004 election creating the Fire District, the Simla Volunteer Fire Department or the Big Sandy Rural Fire Department ceased to exist, that the members of the volunteer fire departments became employees of the Fire District, or that the assets of those volunteer departments were acquired by the Fire District. Nor did the evidence establish that the Fire District had any involvement in the decision to place the signs on the vehicles, approved such placement, or participated in the making or placement of the signs on the vehicles. Under these circumstances, there is simply no evidence that the Fire District had any involvement in the actions Harris has complained about.

In his complaint Harris named only the Fire District as a respondent and did not allege a violation of the state's campaign finance laws by either the Simla Volunteer Fire Department or the Big Sandy Rural Fire Department. Based on the state of the record, Harris has failed to establish the Fire District had any involvement in the alleged violations and thus has failed to establish Respondent Big Sandy Fire District was responsible for any of the acts complained of. Thus, no violation of Section 1-45-117 by the Fire District, the sole respondent named by Harris, has been established.

2. *No Showing Simla Volunteer Fire Department or the Big Sandy Rural Fire Department Are Covered Entities.* As noted, Harris named only the Fire District as a respondent. However, even if Harris had properly named the Simla Volunteer Fire Department and/or the Big Sandy Rural Fire Department as respondents (and such entities had been provided proper notice of this proceeding), Harris nonetheless failed to show that these volunteer associations, the organizational elements of which are undisclosed in the record, are agencies, departments, boards, divisions, bureaus, commissions, councils or political subdivisions of the state such that they would be covered by the prohibitions of Section 1-45-117.²

² For example, it is not at all clear that these volunteer associations would constitute political subdivisions. See *Davidson v. Sandstrom*, 83 P3d 648 (Colo. 2004). Further, the existing record does not support a determination that either of the two volunteer fire departments would fall within the definition of a state agency, department, board, division, bureau, commission or council.

3. *No Showing 2005 Ballot Issue was a Covered Issue.* Even assuming Harris had established the actions complained of were undertaken by an entity covered by Section 1-45-117, he has failed to establish other necessary elements of Section 1-45-117.

The expenditure and contribution expenditure limitations of Section 1-45-117 relate only to specified ballot propositions enumerated in Sections 1-45-117(1)(a)(I)(A)-(D). Harris has neither specified the section upon which he is relying nor established that the ballot issue in question was one covered by the FCPA.

The prohibitions of Section 1-45-117(1)(a) apply to statewide ballot issues [Section 1-45-117(1)(a)(I)(A)], certain local ballot issues [Section 1-45-117(1)(a)(I)(B)], referred measures as defined in Section 1-1-104(34.5) [Section 1-45-117(1)(a)(I)(C)], and recall measures [Section 1-45-117(1)(a)(I)(D)]. Because the evidence established the 2005 ballot issue in question was special fire district election, it is apparent that it was neither a statewide ballot issue nor a recall measure. The record is insufficient, however, to determine that the 2005 ballot issue in question was either a local ballot issue or a referred measure covered by the FCPA.

a. Local Ballot Issue. In order for a ballot question to be a local ballot issue covered by the FCPA it must have "been submitted for the purpose of having a title fixed pursuant to section 31-11-111" or it must have "had a title fixed pursuant to" section 31-11-111. Even assuming the measure was a local ballot issue as defined in Sections 1-1-104(2.3) and 1-41-103(4), the record in this case fails to establish whether, at the time of the acts complained of, the measure had been submitted for the purpose of having a title fixed or had had a title fixed. The evidence indicated the signs in question merely stated "vote yes on November 1," without referencing an issue or ballot number or name, the existence of which would have been indicative that a title had been set. Further, the record does not reveal when a title was actually set for the ballot measure in question or precisely when the homecoming parade occurred. As provided by Section 1-45-117(1)(a)(I)(B), with respect to local ballot issues, the expenditure and contribution limitations of Section 1-45-117(1)(a) are triggered only when a title has been fixed for a local ballot issue or the local ballot issue has been submitted for the purpose of having a title fixed. Prior to that time, no Section 1-45-117 limitations are simply not applicable.

In the absence of any evidence that at the time of the acts complained of the ballot issue in question had been submitted for title setting or had a title set such that the prohibitions of the FCPA were triggered, the record fails to establish the contribution and expenditure limitations of Section 1-45-117 were applicable to the actions complained of by Harris.

b. Referred Measure. The contribution and expenditure prohibitions of Section 1-45-117 also relate to referred measures as defined in Section 1-1-104(34.5). Section 1-1-104(34.5) defines a referred measure as any ballot question or ballot issue

submitted by . . .the governing body of any political subdivision to the eligible electors of the . . . political subdivision pursuant to article 40 or 41 of [title 1]. The record is simply insufficient to determine whether the ballot question at issue in this case was a referred measure.

Because the record has failed to establish that the 2005 ballot question at issue in this case was either a referred measure or local ballot issue covered by Section 1-45-117, and because it is apparent the ballot issue was neither a statewide ballot measure nor a recall measure, the record fails to establish that the 2005 ballot issue one covered by Section 1-45-117. Consequently, the record failed to establish that the contribution and expenditure prohibitions of Section 1-45-117 were applicable to the 2005 ballot measure.

4. *Expenditure or Contribution.* Because Harris has failed to establish the Fire District was responsible for the FCPA violation alleged to have occurred here, has failed to establish the Simla Volunteer Fire Department or the Big Sandy Rural Fire Department are covered entities under Section 1-45-117 even if they had been named as parties, and has failed to establish the 2005 ballot issue was a covered issue under Section 1-45-117, the ALJ need not reach the issue of placing signs on Simla Fire Department vehicles, which signs were paid for solely with private funds but urged a yes vote on the 2005 ballot issue, constituted a prohibited expenditure or contributions under Section 1-45-117.

The ALJ notes, however, without deciding, that it is unlikely such action would constitute an "expend[iture] of any public moneys" as prohibited by Section 1-45-117(1)(a)(I) because there is no evidence that any public moneys at all were spent by any entity, and certainly not by the Fire District which had no money to spend.

Additionally, it is questionable that any "contribution," as defined in the Section 1-45-103(6) of the FCPA and Section 2(5)(a) of Colo. Const., Art. XXVIII, occurred. Section 1-45-103(6) incorporates the definition of contribution found in Section 2(5)(a) of Colo. Const. Art. XXVIII. Section 2(5)(a), in turn, defines contribution as:

(I) The *payment, loan, pledge, gift, or advance of money, or guarantee of a loan*, made to any candidate committee, issue committee, political committee, small donor committee, or political party;

(II) Any *payment* made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party;

(III) The *fair market value of any gift or loan of property* made to any candidate committee, *issue committee*, political committee, small donor committee or political party;

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.

[Emphasis supplied].

Subsection (I) of this definition is not applicable here because no payment, loan, pledge, gift, or advance of money, or guarantee of a loan is involved. Subsection (II) is also not applicable because no payment was involved. Subsection (IV) also does not apply here because nothing was given to a candidate. Thus, the only subsection that is potentially relevant is (III). However, the record does not appear to show that allowing the signs to be placed on Simla Fire Department vehicles constituted a gift or loan of property or that such action had a fair market value. Further, the record did not establish that any issue committee (or other listed committee) existed or was the recipient of any such gift or loan.

Consequently, it is unlikely that any expenditure or contribution as referenced in Section 1-45-117 occurred in this matter.

In summary, Harris has failed to prove the elements necessary establish the Big Sandy Fire District committed a violation of Section 1-45-117, as charged in the complaint.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over this matter. Colo. Const. Art. XXVIII, §(9)(2)(a).

2. Colo. Const. Art. XXVIII, §(9)(1)(f) provides that the hearing in this matter is to be conducted in accordance with the Colorado Administrative Procedure Act ("APA"). Section 24-4-101 *et seq.*, C.R.S. Under the APA the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Harris the proponent of an order seeking a determination that Big Sandy Fire District committed a violation of Section 1-45-117.

3. The evidence failed to show the Fire District committed a violation of Section 1-45-117 of the FCPA.

4. Because no violation of Section 1-45-117 of the FCPA was established, this matter must be dismissed.

AGENCY DECISION

It is the Agency Decision of the ALJ no violation of Section 1-45-117 of the FCPA by the Big Sandy Fire District was established. Harris' complaint is therefore dismissed.

This decision is subject to review by the Colorado Court of Appeals pursuant to Section 24-4-106(11), C.R.S. and Colo. Const. Art. XXVIII, §9(2)(a).

DONE AND SIGNED
February ____, 2006

JUDITH F. SCHULMAN
Administrative Law Judge