

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

CASE NO. OS 2006-0022

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY MEAD SERRA REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY MONTROSE
RECREATION DISTRICT.**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Mr. Mead Serra that the Montrose Recreation District violated § 1-45-117, C.R.S. of the Fair Campaign Practices Act by spending public moneys to urge voters to vote in favor of a planned ballot issue. Hearing upon the complaint was held at the Office of Administrative Courts on September 21, 2006. Mr. Serra appeared on his own behalf. The Montrose Recreation District did not appear. Neither party was represented by an attorney.

Preliminary Matter

The complaint in this case was signed by Mr. Serra, a non-attorney, on behalf of the Committee for Wise Use of Tax Dollars (Committee), an organization formed by Mr. Serra and of which he is an officer. Corporations and organizations are generally required to be represented by an attorney during litigation, *In re Estate of Nagel*, 950 P.2d 693, 694 (Colo. App. 1997), although the mere filing of an administrative complaint by an organization does not necessarily require an attorney, *BQP Industries v. State Bd. of Equalization*, 694 P.2d 337, 342 (Colo. App. 1984). Consistent with *Estate of Nagel* and *BQP Industries*, the Office of Administrative Courts accepted the Committee's complaint signed by Mr. Serra, but advised the Committee in the Notice of Hearing that it needed an attorney to represent it at the hearing. No attorney appeared for the Committee at the hearing. Instead, Mr. Serra asked to amend the complaint to substitute him, personally, for the Committee as the complainant. The request was granted and Mr. Serra then represented himself as the complainant. The case caption was amended to reflect Mr. Serra is the complainant.

Issue

The Montrose Recreation District (District) is a political subdivision subject to the restrictions of § 1-45-117 of the Fair Campaign Practices Act. Mr. Serra alleges that the District violated this law by expending public moneys to urge district voters to vote in favor of a planned ballot issue to fund a new recreation center. Although money was spent to mail a promotional flyer to prospective voters and to conduct a phone survey of potential voter support, the District did not proceed with the ballot after the survey

disclosed insufficient support for the proposal. The issues are whether the flyer and the telephone poll were funded by public moneys, and if so, whether there was a violation of the FCPA given that the ballot issue did not go forward. The ALJ concludes that no violation of the FCPA has been proven.

Findings of Fact

1. The District is a “special district” formed under the provisions of the Special District Act, §§ 32-1-101 to 1702, C.R.S.

2. The District developed a plan to build a new recreation center to accommodate its growing needs. The District’s plan to fund this new facility included an increase in the property tax mill levy assessed to District residents, and a 12 million dollar contribution from the City of Montrose funded by sales tax revenues. Both of these taxing provisions required voter approval.

3. To provide for lease of land upon which to build the recreation center, and to provide for the City of Montrose’s 12 million dollar contribution, the City and the District proposed to enter into an Intergovernmental Agreement (IGA). Although the IGA was drafted, it is not clear that it was ever signed.

4. To further its plan to fund and build the new recreation center, the District developed a flyer to be mailed to at least 6,700 households within the District. The flyer, titled “Recreation Center Update,” was a one-sided promotional piece explaining the need for the new recreation center and the plan to fund it. The flyer explained that a new recreation center was needed because Montrose was “one of the fastest growing small cities in Colorado” and that existing facilities were “beyond capacity.” It explained that as the result of limited facilities, there were “scheduling conflicts” and “limited, affordable choices for recreation.” The inside of the flyer contained a description of the proposed facility and an endorsement that the new facility would “offer affordable recreational opportunities” that would “further improve our community’s quality of life.” The flyer was entirely positive. It offered no arguments against the recreation center and included no negative information about it. The flyer did not expressly advocate voters to vote for the recreation center, but it did allude to the need for voter approval in the November election in order to proceed with plans to build the center.

5. The flyer cost at least \$4,200 to prepare and mail. It was mailed to District households on or about August 25, 2006.

6. The District also commissioned a phone survey of 400 District residents to assess support for the proposal. The phone survey was conducted in late August, several days after the flyers were mailed. The phone survey cost at least \$8,000 to conduct.

7. The source of funding for the flyer and phone survey is not clear. Although it is reasonable to speculate that the District funded the flyer given that it appears to be an official publication of the District, there is insufficient evidence to actually prove the District funded it. Mr. Serra offered a newspaper clipping which said the survey was conducted “at a cost of roughly \$8000 to the district,” the journalist does

not disclose the source of that information and the ALJ does not find the clipping sufficiently reliable evidence to support a finding that the \$8000 was public money. In the absence of such evidence, the ALJ is unable to find that public money, as opposed to private funding, was used to fund either the flyer or survey.¹

8. The results of the phone survey did not support the new recreation center and therefore the District did not proceed with a ballot issue. Although a ballot issue was planned had the phone survey results been favorable, there is no evidence a ballot issue was ever submitted for the purpose of having a titled fixed or that a title was fixed.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of the adoption of Article XXVIII of the Colorado Constitution. The purpose of the FCPA is to avoid the potential for, and the appearance of, corruption in the political process. Section 1-45-102.

The section of the FCPA at issue in this case is § 1-45-117(1)(a)(I). That section prevents government agencies and political subdivisions from expending "any public moneys from any source ... to urge electors to vote in favor of or against any ... local ballot issue that has been submitted for the purpose of having a title fixed ... or that has had a title fixed." Its purpose is to promote confidence in government by prohibiting the use of moneys authorized for public purposes to advance the personal viewpoint of one group over another. *Denver Area Labor Federation v. Buckley*, 924 P.2d 524, 528 (Colo. 1996). Violations subject the agency or political subdivision to fines, injunctive relief, restraining orders and other "appropriate" relief. Section 1-45-117(4).

As applied to this case, the elements necessary to prove a violation of § 1-45-117(1)(a)(I) are:

- 1) That the District is a political subdivision;
- 2) Which expended public moneys;
- 3) To urge electors to vote in favor of a ballot issue;
- 4) Which had been submitted for the purpose of having a title fixed or which had a title fixed.

Only elements 1 and 3 have been proven. The District is a political subdivision formed as a special district under authority of the Special District Act, §§ 32-1-101 to

¹ Mr. Serra suggested he could not get evidence to prove the source of funding because the District was elusive in responding to his questions about funding. However, Mr. Serra had available to him subpoenas and other discovery tools to compel disclosure of the District's funding source, had he chosen to employ them. See § 24-4-105(5), C.R.S., which is applicable to this proceeding pursuant to Colo. Const. art. XXVIII, § 9(1)(f).

1702, C.R.S. There is little doubt that the District spent money from some source to urge District residents to support a ballot issue to fund the new recreation center. Although the flyer did not expressly advocate that residents vote for the proposal, the flyer was an entirely positive description of the project and contained no arguments against it. As such, it "urged" a favorable vote. *Skruch v. Highlands Ranch Metropolitan Districts No. 3 and 4*, 107 P.3d 1140, 1142 (Colo. App. 2004). Although the law does not prohibit a district from spending public money to "dispense a factual summary" of a proposal, the factual summary "shall include arguments both for and against the proposal" and "shall not contain a conclusion or opinion in favor of" the proposal. Section 1-45-117(1)(b)(I). The flyer's lopsided treatment of the recreation center proposal did not contain arguments both for and against, but instead expressed opinions in favor of the proposal. It was thus not a "factual summary" qualifying for this exception. *Id.*

Elements 2 and 4, however, have not been proven. There is insufficient evidence that either the flyer or the phone survey were funded with public money. Although the General Assembly may have intended an expansive definition of the term "public moneys," *Denver Area Labor Federation*, 924 P.2d. at 527, there must still be reliable evidence that the funding came from the District rather than from a private source. Moreover, even if the money spent was public money, the complaint still fails because the ballot issue was not submitted for fixing of a title and no ballot title was fixed. As the complainant in the matter, Mr. Serra bears the burden of proving all the elements of his claim by a preponderance of the evidence. Section 24-4-105(7), C.R.S. That burden has not been met.

Agency Decision

The Montrose Recreation District did not violate § 1-45-117 of the Fair Campaign Practices Act. This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed
September 26, 2006

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded in CR #1
Exhibits admitted
For complainant: exhibit 1, 2, 3, 4
For defendants: none

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Mead Serra
100 Apollo Road
Montrose, CO 81401

Montrose Recreation District
2101 S. Rio Grand Avenue
Montrose, CO 81401

and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 270
Denver, CO 80290

on this ____ day of September 2006.

Technician IV