

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

CASE NO. OS 2007-0001

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY JAN TYLER REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
COUNCILWOMAN CAROL BOIGON**

This matter is before the Office of Administrative Courts on the complaint of Jan Tyler ("Complainant") against Denver City Councilwoman Carol Boigon ("Respondent"). The complaint was filed with the Colorado Secretary of State ("Secretary") on January 8, 2007. On January 11, 2007, the Secretary referred the complaint to the Office of Administrative Courts as required by Colo. Const. art. XXVIII, § 9(2)(a). The case was referred to an Administrative Law Judge ("ALJ") and a merits hearing was scheduled on January 26, 2007 in Denver, Colorado.

On January 26, 2007 the parties appeared before ALJ Michelle A. Norcross. Complainant appeared *pro se*. Respondent appeared personally and was represented by David W. Broadwell, Assistant City Attorney. At the hearing, the ALJ admitted Complainant's exhibit 1 and Respondent's exhibits A and B into evidence without objection. The proceedings were digitally recorded in courtroom 1.

Parties' Positions

Complainant: In her complaint, Complainant contends that Respondent violated the Fair Campaign Practices Act ("FCPA"), specifically § 1-45-117, C.R.S., by using more than \$50 of taxpayer moneys to publish a newsletter endorsing a "yes" vote on Referendum 1A and urging voters to vote "yes" on Referendum 1.¹ At hearing, Complainant also alleged that Respondent violated Colorado's campaign laws by failing to disclose who paid the costs associated with the newsletter.

Respondent: Respondent disagrees with Complainant's assertions and states that no taxpayer moneys were used to publish the newsletter. Rather, Respondent used her own funds to pay all the costs associated with publishing and distributing the newsletter. As such, she did not violate § 1-45-117, C.R.S. Accordingly, Respondent requests that the complaint be dismissed.

¹ The complaint also alleges that Respondent's newsletter contains "false claims". The ALJ has no jurisdiction regarding the veracity or completeness of statements in the newsletter under § 1-45-117 or any other law. Therefore, these allegations are not addressed in this Agency Decision.

FINDINGS OF FACT

1. Respondent is an at-large member of the Denver City Council. Among other things, the Denver City Council has the authority to refer to eligible voters in the City and County of Denver amendments to the Denver Home Rule Charter ("the charter" or "City charter").

2. On November 7, 2006, the State held a general election. During the November 7 election, the Denver Election Commission encountered several problems. Shortly after the November 7 election, Respondent and other members of the Denver City Council determined that changes needed to be made in the governance and management of elections within the City and County of Denver, which would likely require a change to the City's charter. These debates and discussions between members of the Denver City Council and the public date back to at least the summer of 2005.

3. Near the end of each calendar year, it is customary for members of the Denver City Council to publish and distribute newsletters to their constituents. Each member is free to choose what topics he or she would like to discuss. In mid-November 2006, shortly after the November 7 election, Respondent decided to publish a newsletter on the topic of election reform in support of an amendment to the City's charter. Respondent admits that in her newsletter she advocated for an amendment to the City's charter that would eliminate the Election Commission and replace it with an elected clerk and recorder. At the time Respondent wrote her newsletter the City's next regularly scheduled election was May 1, 2007.

4. At a date prior to December 26, 2006, Respondent completed her newsletter and sent it to the City's Department of General Services for printing and mailing, which is the general custom and practice of the Denver City Council. The Department of General Services is responsible for printing and mailing the newsletters. Following distribution, the Department of General Services prepares an invoice for payment for printing and distribution costs. Normally, the costs of the newsletters are paid using City Council funds. In the instant case, Respondent's newsletter was mailed to 15,000 voters on December 28, 2006.

5. On December 26, 2006, during a City Council meeting, a majority of the members of the Denver City Council passed Ordinance 851. Ordinance 851 referred to the qualified and registered electors of the City and County of Denver at a special municipal election to be held on January 30, 2007 a proposed amendment to the charter providing for the direct election of the Clerk and Recorder; defining the powers and duties of the Clerk and Recorder including the power to conduct elections; and repealing provisions related to the Election Commission.

6. On January 11, 2007, Respondent received an invoice from the Department of General Services in the amount of \$5,711.21 for the costs associated with printing and distribution of her newsletter.

7. When Respondent received the invoice on January 11, 2007, she chose to use her personal funds to pay all the costs associated with the publication of her newsletter rather than using City Council funds. Respondent paid the invoice in full on January 11, 2007.

DISCUSSION

Section 1-45-117 (1)(a)(I), C.R.S. 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 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.

(II) However, a member or employee of any such agency, department, board, division, bureau, commission, or council may respond to questions about any such issue described in subparagraph (I) of this paragraph (a) if the member, employee, or public entity has not solicited the question. A member or employee of any such agency, department, board, division, bureau, commission, or council who has policy-making responsibilities may expend not more than fifty dollars of public moneys in the form of letters, telephone calls, or other activities incidental to expressing his or her opinion on any such issue described in subparagraph (I) of this paragraph (a).

* * *

(C) Nothing in this subsection (1) shall be construed as prohibiting a member or an employee of an agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof from expending personal funds, making contributions, or using personal time to urge electors to vote in favor or against any issued described in subparagraph (l) or paragraph (a) of this subsection (1).

(emphasis added)

It is undisputed that following the November 7, 2006 general election Respondent prepared a newsletter urging the voters of the City and County of Denver to change the City's charter to eliminate the Election Commission and replace it with an elected clerk and recorder. Respondent admits that in her newsletter she advocated for such a change at the next election, which was then scheduled for May 1, 2007. At the time Respondent prepared her newsletter and sent it to the Department of General Services for distribution, the City Council had not yet referred a measure to change the City's charter or scheduled a special election on January 30, 2007. City Council, by majority vote, passed Ordinance 851 and referred the measure on December 26, 2006. Respondent's newsletter was mailed on December 28, 2006. Because Ordinance 851 passed on December 26 and an election was scheduled on January 30, 2007, on January 11, 2007, when Respondent received the invoice from the Department of General Services she chose to use her own money rather than City Council funds to pay for the entire costs of the newsletter. The ALJ finds no evidence that Respondent used any public moneys to publish the newsletter. If there is no evidence that public moneys were used to publish the newsletter, there can be no violation of § 1-45-117, regardless of whether Respondent urged voters to support a change to the City's charter. At hearing, Complainant also argued that Respondent violated § 1-45-117 by failing to disclose who paid the costs of publishing the newsletter. The ALJ disagrees. Nothing in § 1-45-117 requires such a disclosure. Complainant's argument is without merit.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const. art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter.
2. If the ALJ determines that a violation of the FCPA has occurred, the ALJ's decision must include the appropriate order, sanction or relief authorized by Article XXVIII of the Colorado Constitution.
3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA), § 24-4-101, *et seq.*, C.R.S. Under the APA, the proponent of an order has the burden of proof. § 24-4-

105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking sanctions and/or other relief against Respondent for violations of the FCPA. Accordingly, Complainant has the burden of proof.

4. The ALJ concludes that Complainant has failed to establish by a preponderance of the evidence that Respondent violated § 1-45-117, C.R.S.

AGENCY DECISION

It is the Agency Decision of the ALJ that Complainant has failed to prove that Respondent violated § 1-45-117, C.R.S. or any other provision of the FCPA, as alleged in the January 8, 2007 complaint. Complainant's January 8, 2007 complaint is hereby dismissed.

This decision is subject to review with 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
February 9, 2007

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Jan Tyler
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and

William Hobbs
Secretary of State's Office
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Denver, CO 80290

on this ____ day of February 2007
