

# **Summary of Select Administrative Law Judge Decisions and Case Law Interpreting the Fair Campaign Practices Act**

This memorandum contains a summary of select Administrative Law Judge (“ALJ”) decisions interpreting Section 117 (“Section 117”) of the Fair Campaign Practices Act (“FCPA”). *See* Colo. Rev. Stat. § 1-45-117. The summary includes select ALJ decisions from 1996 through February, 2007, as well as the subsequent appellate history of *Skruch v. Highlands Ranch Metropolitan Districts Nos. 1-5* and *Colorado Common Cause v. Coffman*. The decisions and cases are listed in reverse chronological order.

Updated through January, 2008

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***Colorado Ethics Watch v. City of Lakewood, Case No. OS 2007-0020 (Spencer, ALJ)***

Background:

Prior to an election to select certain City Council members in the City of Lakewood, several citizens, including candidates for City Council, attended a regularly-scheduled City Council meeting and made negative remarks about the current City Council and some of its actions during the portion of the meeting allotted to public comments. Later in the meeting, Cheryl Wise, the President of the City Council, spoke from her seat on the dais and urged voters to vote against candidates who were critical of the City government and to vote for Karen Kellen, a City Council candidate who had spoken favorably about the City and its staff. The City Council meeting, like all Lakewood City Council meetings, was broadcast on public access television and the City's website. Each of these transmissions involved the expenditure of some City funds.

Holding: The City did not violate the FCPA.

1. A public entity that regularly broadcasts its official meetings does not violate Section 117 if an individual, including an official of the public entity, urges electors to vote for or against a candidate during a meeting and such comments, like the rest of the meeting, are broadcast via a system funded with public money.

The ALJ found that Lakewood was subject to Section 117 and that Ms. Wise's comments addressed campaigns involving the election of any person to public office. Thus, the remaining question for Section 117 purposes was whether the broadcasting of the comments amounted to a "contribution" under Section 117. The ALJ found that it did not for at least two reasons. First, a contribution must be made "for the purpose of promoting the candidate's nomination, retention, recall or election." The ALJ found that this was not the case because the City Council meetings were broadcast in their entirety for the sole purpose of providing citizens access to their government. No evidence was presented that the broadcasting of Ms. Wise's comments occurred for any reason other than the routine practice of showing every meeting "gavel to gavel," and, therefore, the ALJ found that the City did not act with a purpose of promoting the campaign of any candidate. Second, for a contribution to occur, the public entity must provide a candidate's campaign "anything of value." The ALJ found that this requirement had not been met because no evidence was presented showing that any City facilities or staff time were used to broadcast Ms. Wise's comments that would not have been dedicated to the City's usual broadcasting of the entire meeting.

***Colorado Ethics Watch v. City and County of Broomfield, Case No. OS 2007-0019 (Spencer, ALJ)***

Background:

Prior to an election to select the Mayor and certain City Council members in the City and County of Broomfield, an organization called FRIENDS held a candidate forum focusing on Section 8 housing and other issues pertaining to developmentally disabled individuals. Prior to

the forum, FRIENDS circulated a questionnaire to all the candidates relating to information to be discussed at the forum. Clark Griep, a candidate for Mayor who had previously served on the City Council and was a friend of the City Manager, asked the City Manager if he could provide information relating to the questions asked by FRIENDS in the questionnaire. At the City Manager's instruction, several members of the City's staff gathered the information and provided it to the City Manager, who provided it to Mr. Griep. The information was also provided to all members of the City Council, including members running for re-election who would be participating in the FRIENDS forum. The information was not provided to non-incumbent candidates other than Mr. Griep.

Holding: The City did not violate the FCPA.

1. Public entity staff time may be used to provide information that will be used in a candidate's campaign without making an unlawful "contribution" to that campaign so long as the information is not provided for the purpose of promoting the campaign.

The ALJ found that Broomfield was subject to Section 117, that the staff time expended to prepare the responses to the questionnaire was a "thing of value" and that several of the recipients of the information were engaged in campaigns involving the election of any person to public office. Thus, the only remaining question for Section 117 purposes was whether the work product created using staff time and provided to the candidates was given "for the purpose of promoting the candidate's nomination, retention, recall or election." The ALJ found that this was not the case. While the staff's responses were tailored to questions provided in connection with a candidate forum and the staff had reason to know that the information would likely be used by the candidates as part of their campaigns, the ALJ found that the complainant had not met its burden of proof in showing that the staff provided the information for the purpose of promoting the candidates' campaigns.

The City had a standing policy of providing information regarding the City to any citizen who requested it, free of charge, so long as the request was not unduly burdensome. The ALJ found that Section 117 did not prohibit the City from honoring this policy simply because the requestor was a candidate for office who might use the information in that capacity. Because the City staff time dedicated to the effort was part of the City's normal informative procedures and not for the purpose of promoting a candidate's campaign, the staff did not violate Section 117 by spending time gathering the information requested in response to a candidate questionnaire.

### ***Tyler v. Boigon, Case No. OS 2007-0001 (Norcross, ALJ)***

#### Background:

After the City and County of Denver experienced election difficulties at the November, 2006, election, City Councilwoman Carol Boigon wrote and circulated a newsletter to 15,000 voters advocating an amendment to Denver's charter to dissolve the city's election commission and create an elected clerk and recorder.

Holding: Ms. Boigon did not violate the FCPA.<sup>1</sup>

1. A public official does not violate Section 117 if she pays for the cost of materials urging electors to vote in a certain way using her own personal funds.

Ms. Boigon's newsletter advocated a change to Denver's charter to dissolve the election commission, and the City Council referred such a measure to the voters before the newsletter was delivered. However, while Councilmembers' newsletters were generally created and distributed using City funds, when the invoice for the newsletter in question was delivered to Ms. Boigon, she elected to pay the invoice with her personal funds. Thus, no Section 117 violation occurred because no public moneys were spent on the newsletter.

### ***Brown v. City of Littleton, Case No. OS 2006-0023 (Spencer, ALJ)***

Background:

The Colorado Municipal League ("CML") published a memorandum in August, 2006, regarding the potential effects of Amendment 38, a statewide ballot initiative submitted to the voters in the November, 2006, election. The memorandum was urged readers to vote against Amendment 38. The City reproduced this memorandum and mailed the memorandum, along with a cover letter from the Mayor urging recipients to consider its content in deciding how to vote, to the 99 members of the City's boards and commissions. The cost to create the Mayor's letter, reproduce the letter and the memorandum, and mail it to the board and commission members, including associated staff time, was \$157.85.

Holding: The City violated the FCPA.

1. A public entity may not use public funds to distribute materials urging a vote against a statewide ballot initiative.

The City's conduct met all the requirements for a Section 117 violation because: (1) the City is a political subdivision of the state; (2) which expended public moneys; (3) to urge electors to vote against Amendment 38; (4) which had been submitted for the purpose of having a title designated and fixed or which had a title designated and fixed. All of the costs for creating the letter and reproducing and distributing the letter and the memorandum were paid with City funds. In addition, even though the Mayor's letter did not urge a vote against Amendment 38, the accompanying materials from CML unequivocally opposed the measure and thus the communication as a whole "urged" a vote against within the meaning of Section 117.

2. The exception to Section 117 allowing for officials with policy-making responsibilities to spend up to fifty dollars in public money incidental to expressing his or her opinion on an issue may not be aggregated among several officials to allow an expenditure greater than fifty dollars.

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<sup>1</sup> The ALJ did not address whether the complaint was invalid because it was filed against Ms. Boignon, an individual, instead of against the City and County of Denver. Previous decisions have held that only public entities, not individuals, can violate Section 117. See *Bruce v. City of Colorado Springs*, Case No. OS 2003-005; *Smith v. Burkholder*, Case No. 20050026.

The City argued that while the total amount of public money spent to distribute the letter and memorandum was greater than fifty dollars, the expenditure fit within the fifty dollar exception to Section 117 because five of the members of the City Council opposed Amendment 38, and thus they could jointly spend up to \$250 to express their collective view. The ALJ disagreed, stating that if such aggregation was allowed, government entities with many members could potentially spend large amounts of public money urging voters to vote for or against a measure. The ALJ concluded that this would not honor the intent of Section 117 and would “gut the rule,” and, therefore, held that aggregation of the fifty dollar exception could not be aggregated by several officials.

3. Section 117 is subject to an exception for internal government communications.

The ALJ stated, sua sponte, that there is an exception to Section 117 for internal government communications implied by the text of the law itself. Section 117 only prohibits spending public money to “urge voters” to vote in a certain way. Because internal government communications are used to facilitate the functioning of government and not to urge voters to vote in a particular way, they are not covered by Section 117. The essential feature of this exception is whether the communication was intended for official purposes, or was intended to “urge” or influence the recipient’s vote. The ALJ held that the exception did not apply in this case, however, because the Mayor’s letter and the CML memorandum were sent to attempt to influence how the individual board and commission members would vote on Amendment 38, instead of simply informing them of an issue affecting their duties as board or commission members.

4. The penalty for a Section 117 violation can be monetarily significant, even if the violation was not.

The ALJ noted that while the monetary amount involved in the City’s violation of Section 117 was relatively insignificant, the violation itself was not. For this reason, the ALJ imposed a fine of \$500 for a violation that involved less than \$200 of public moneys. The ALJ did not offer any further explanation of how it selected \$500 as the amount of the sanction.

## ***Serra v. Montrose Recreation District, Case No. OS 2006-0022 (Spencer, ALJ)***

### Background:

The Montrose Recreation District prepared a flyer and mailed it to 6,700 households within the District explaining the need for a new recreation center and advocating the construction and funding of such a facility. At least \$4,200 was used to prepare and distribute the flyer.

The District also commissioned a phone survey of District inhabitants to gauge support for the new recreation center, which cost approximately \$8,000. After the phone survey showed insufficient resident support, the District chose not to pursue electoral authorization to fund the new recreation center.

Holding: The District did not violate the FCPA.

1. A promotional flyer that discusses the possibility of a new public facility that will require voter-authorized funding in entirely positive terms “urges” a positive vote for such funding, even if the material does not expressly advocate citizens to vote in a particular way.

The ALJ found that the promotional flyer about potential new recreation center “urged” a favorable vote for financing the center because the flyer was entirely positive and offered no arguments against the plan. The flyer also expressed an ultimate opinion in favor of the new recreation center.

2. A government entity need only comply with the FCPA’s restrictions on the use of public moneys to advocate or oppose a ballot issue after the measure has been submitted for having a ballot title fixed or if a ballot title has been fixed for the measure.

Section 117’s restrictions on the use of public moneys only apply with respect to ballot issues that have been submitted for the purpose of having a title fixed or have had a title fixed. In this case, the District chose not to proceed with an election because the phone survey showed insufficient citizen support. No measure was submitted for having a title fixed or had a title fixed, and therefore the District could not have violated Section 117.

3. To prevail in an action based on Section 117, a complainant must show that the public entity defendant is responsible for the conduct that is the basis of the complaint.

Although the promotional flyer appeared to be an official District communication and there were newspaper reports stating that the District had paid for the phone survey, the complainant did not offer any direct evidence showing that District moneys were spent on either item. The ALJ reiterated that in a Section 117 complaint, the complainant has the burden of proof. The complainant stated that he could offer no evidence because the District was “elusive” in answering his questions. However, the ALJ stated that this did not justify a lack of necessary evidence because the complainant had subpoenas and other discover tools at his disposal pursuant to C.R.S. Section 24-4-105(5) and he did not choose to employ them.

***Struble v. Williams, Case No. OS 2006-0011 (Muramoto, ALJ)***

Background:

Holly Williams served as the Public Trustee for El Paso County in 2004. The complainant alleged that Ms. Williams, while serving as Public Trustee, used a County telephone line to connect her personal computer in order to perform campaign activities for a District Attorney candidate.

Holding: The ALJ had no jurisdiction over the complaint.

1. An ALJ has no jurisdiction over a Section 117 complaint that is not filed within 180 days of the date of the alleged violation.

Article XXVIII, Section 9(2)(a) of the Colorado Constitution requires any claim alleging a Section 117 violation be filed with an ALJ no later than 180 days after the date of the alleged violation. The latest possible date of the alleged violation by Ms. Williams was in November, 2004, and the complainant's claim was filed in May, 2006. Thus, notwithstanding the potential merits of the claim, it was dismissed for lack of jurisdiction as being time-barred.

***Tippett v. Town of Snowmass Village, Case No. OS 2005-0032 (Cannici, ALJ)***

Background:

The Snowmass Village Town Council passed resolutions setting three local ballot issues for the November, 2005 election. These resolutions called for a bond issue to construct a new town hall, a bond issue to construct a recreation center, and the imposition of a lodging tax.

The town produced a video called "Town Talk," which was broadcast several times on public access television in the town. In the video, a host interviewed two members of the town council and the town manager about the recreation center and lodging tax ballot issues. The entire discussion focused on arguments for the proposals, and no arguments against the proposals were included.

In a town-sponsored newsletter, an article appeared among many others titled "Building a Town Hall Worthy of Snowmass." The article positively discussed the planned design and location of the new town hall, but did not mention the ballot issue related to financing the new town hall.

Finally, the town passed Resolution No. 39, which urged electors to support all three ballot measures. Resolution No. 39 was published in the local newspaper. Employee time was used to prepare the resolution, but a private group paid the advertising costs.

Holding: The town violated the FCPA

1. A public entity may not use public funds to create and broadcast a television show that urges electors to vote for election issues without containing any arguments against the issues.

The ALJ found that the “Town Talk” video “did not merely inform the viewers about the issues, but effectively presented arguments in support of the proposed ballot issues.” Because the presentation did not contain any arguments against the ballot issues, the ALJ found that, in making the video, the town expended public funds to urge electors to vote in favor of the issues. The ALJ further rejected the town’s argument that there is an exception to Section 117 for public access television content.

In fixing a sanction, the ALJ noted that C.R.S. § 1-45-117(4) allows for any sanction contained in section 1-45-113 or any other appropriate order or relief. The ALJ further noted that section 1-45-113 was repealed in 2002. Therefore, the ALJ turned to section (10)1 of Article XXVII of the Colorado Constitution for guidance in crafting an appropriate relief. That section provides for a civil penalty of at least double and up to five times the amount of the violation. The ALJ found that the town spent \$223 to produce and broadcast the video, and therefore assessed a penalty of double that amount, \$446. The ALJ declined to levy a larger penalty because it would only aggravate the violation by costing the citizens of Snowmass Village more.

2. A public entity may use public funds to publish material that speaks positively about a public project that is the subject of a covered election issue if the material does not address the election issue itself.

The Town’s newsletter discussed the planned design and location of the new town hall, and stated that the design would complement the mountain character of the town and the location would be convenient and accessible. However, the newsletter did not mention the proposed ballot issue authorizing bonds to fund the construction of the town hall. Because the article did not mention the ballot issue, the ALJ found that the case was distinguishable from *Skruch v. Highlands Ranch Metropolitan Districts*,<sup>2</sup> and that no Section 117 violation occurred. Therefore, even though the construction of the town hall described in the article was highly unlikely without the passage of the bond issue, an article that positively described the town hall did not urge voters to vote in favor of the underlying election question.

3. A public entity does not violate the FCPA by passing a resolution in favor of an election issue, even if a third party then pays to publish the resolution.

The ALJ found that the town’s Resolution No. 39 fit squarely within the Section 117 exception allowing public entities to pass resolutions for or against an election issue. *See* Colo. Rev. Stat. § 1-45-117(1)(a)(III)(A). The ALJ noted that while this exception would not cover using town funds to publish the resolution in a newspaper, in this case an outside group sponsored the publication, and therefore the town did not violate Section 117.

### ***Harris v. Big Sandy Fire District, Case No. OS 2005-0031 (Schulman, ALJ)***

#### Background:

Fire services for the town of Simla were provided by the Simla Volunteer Fire Department. Fire services for the area immediately outside the town limits of Simla were provided by the Big Sandy Rural Fire Department, also a volunteer organization. Both volunteer

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<sup>2</sup> See summary below.

fire departments were funded primarily via donations and government grants, although the town of Simla paid utility companies directly for the Simla fire department's electricity and propane.

In November 2004, electors in the areas covered by both volunteer fire departments voted to create the Big Sandy Fire District, a political subdivision with the authority to raise funds via a mill levy. However, no mill levy was authorized in the November 2004 election, so the Big Sandy Fire District had no funds. After the November 2004 election and the creation of the fire district, the volunteer fire departments continued to operate as they had before, with no funding from the Big Sandy Fire District.

In November 2005, a mill levy ballot measure was proposed for the Big Sandy Fire District. On an undisclosed date in the fall of 2005, one or more fire trucks that were participating in a school homecoming parade carried signs stating "Support your local fire department. Vote yes on November 1." The signs were prepared by the Simla Volunteer fire chief using personal resources.

Holding: The fire district did not violate the FCPA.

1. To prevail in an action based on Section 117, a complainant must show that the public entity defendant is responsible for the conduct that is the basis of the complaint.

In an FCPA enforcement action, the burden of proof lies with the complainant to show that a violation has occurred. In order to prove a Section 117 violation with respect to a ballot issue, the complainant must show that a public entity expended public moneys or made a contribution to urge electors to vote for or against certain measures. Here the ALJ found that the fire district named as the defendant was clearly a covered entity, and the signs placed on the fire trucks clearly urged electors to vote for the measure. However, the ALJ found no evidence that the fire district was responsible for placing the signs on the fire trucks. The ALJ noted that the signs could have been placed by the volunteer fire department or one of its individual members. The complainant offered no evidence showing that the unfunded fire district had anything to do with the incident, and therefore failed to prove that the fire district violated Section 117.

2. To prevail in a Section 117 enforcement action, a complainant must show that the defendant is an entity that is covered by Section 117.

Although the complainant did not name either the Big Sandy or Simla volunteer fire departments as defendants, the ALJ considered whether the complainant had provided sufficient evidence to establish a Section 117 violation by either organization. The record contained little information about the organizational structure of the volunteer fire departments, and therefore the ALJ could not conclude that either was an agency, department, board, division, bureau, commission, council or political subdivision of the state as would be required for Section 117 to apply.

3. To To prevail in a Section 117 enforcement action with respect to a ballot issue, a complainant must show that the issue is covered by Section 117.

The prohibitions of Section 117 only apply to elections on certain types of ballot issues. The ALJ found that the complainant failed to provide evidence that showed the fire district mill

levy question at issue was either a covered referred measure or a covered local ballot issue. Therefore, the complainant failed to show that the election issue was covered by Section 117.

4. To prevail in a Section 117 enforcement action,, the complainant must show that a covered expenditure or contribution has occurred.

Section 117 prohibits public entities from expending public moneys or making contributions in certain situations. The ALJ noted, without deciding, that the complainant likely failed to show that either a covered expenditure or contribution occurred. At the time of the alleged violation, the defendant fire district had no funds, so the complainant failed to show that the district had made an expenditure of public funds in support of the election issue. Without evidence of any other type of payment, loan, pledge, gift, advance, or loan guarantee to any committee or third party on behalf of a committee, the ALJ noted that the only possible covered action remaining was a gift or loan of property. Once again, the ALJ noted that there was no evidence that the placement of signs on a fire truck constituted a gift or loan of property that had market value. Therefore, the ALJ noted, without deciding, that the complainant likely failed to show that a covered expenditure or contribution occurred.

### ***Fatur v. AFSCME Council 76, Case No. OS 2005-030 (Norcross, ALJ)***

#### Background:

The complainant alleged that a labor union violated the FCPA by failing to register as a political or small donor committee before engaging in certain advocacy relating to a City of Trinidad election. The union moved to dismiss, arguing that the FCPA did not apply to City of Trinidad elections because the City of Trinidad is a home rule municipality.

Holding: The union violated the FCPA.

1. Home-rule municipality elections are only exempt from the FCPA if the municipality has adopted charter provisions, ordinances, resolutions or other local regulations that address the same matters covered by the FCPA.

The ALJ, citing a Formal Opinion from the Colorado Attorney General, found that the FCPA does not apply to home rule counties or municipalities that have charters or ordinances that already address the matters covered by the statute. However, the ALJ also found that if a home rule municipality has not independently regulated the areas addressed by the FCPA, the FCPA still applies to that municipality's elections. In this case, the City of Trinidad had adopted charter provisions governing certain aspects of the election process, but had not addressed campaign finance or practices. Therefore, the ALJ found that the FCPA applied to Trinidad elections notwithstanding its status as a home rule municipality.

### ***Mills v. Community Options, Inc., Case No. OS 2005-0027 (Cannici, ALJ)***

#### Background:

The complainant alleged that Community Options, Inc. violated Section 117 of the FCPA by using state funds to support the passage of Referenda C and D in the November, 2005

election. Community Options is a private corporation that functions as a “community centered board,” as defined in C.R.S. § 27-10.5-102(3), by contracting with the state to provide services to developmentally-disabled individuals. The defendant moved to dismiss on grounds that the FCPA did not apply to it.

Holding: The non-profit corporation did not violate the FCPA.

1. Section 117 of the FCPA does not apply to private organizations, but instead only to public entities.

The ALJ found that the plain language of Section 117 prohibits certain conduct by any “agency, department, board, division, bureau, commission or council of the state or any political subdivision thereof.” Colo. Rev. Stat. § 1-45-117(1)(a)(I). Therefore, Community Options could not have violated Section 117 unless it qualified as a political subdivision of the state. While the FCPA does not specifically define the phrase “political subdivision,” the ALJ found that political subdivisions “are either created by the state or administered by individuals who are responsible to public officials or the electorate.” The ALJ found that, as a private corporation, Community Options did not meet this definition and therefore was not a political subdivision of the state. Community Options’s relation to the state was merely as an independent contractor, and its contract with the state provided that neither Community Options nor any of its employees were to be considered agents of the state. Therefore, the ALJ found that Community Options was not a political subdivision or any other form of state entity, and therefore it was not subject to the provisions of Section 117 of the FCPA.

### ***Smith v. Burkholder, Case No. OS 2005-0026 (Norwood, ALJ)***

#### Background:

The complainant alleged that the Mayor, City Manager and a City Councilman of the City of Lakewood violated Section 117 of the FCPA. The defendants moved to dismiss on grounds that the FCPA did not apply to them.

Holding: The city officers did not violate the FCPA.

1. Section 117 of the FCPA does not apply to individuals, but instead only to public entities.

The ALJ found that the plain language of Section 117 prohibits certain conduct by any “agency, department, board, division, bureau, commission or council of the state or any political subdivision thereof.” Colo. Rev. Stat. § 1-45-117(1)(a)(I). The ALJ found this language only applies to public entities or “arms of the state,” and therefore dismissed the complaint against the three individual defendants.<sup>3</sup>

### ***Olson v. City of Golden, Case No. OS 2005-0021 (Norwood, ALJ)***

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<sup>3</sup> The ALJ upheld this result even though one of the defendants had been deemed responsible for a Section 117 violation in a previous case. See *Muller v. Burkholder*, Case No. OS 2002-012. The ALJ explained that the majority of cases agree that Section 117 does not apply to individuals, and therefore the issue of applicability was likely not raised in the *Muller* case.

Background:

A complainant challenged the City of Golden's municipal election code, claiming it violated the FCPA. The ALJ dismissed the complaint on ripeness grounds. The city sought to recover its attorney's fees incurred in defending the action.

Holding: The City was not entitled to attorney's fees.

1. An FCPA complaint or defense must have an obvious, objective deficiency in order to lack substantial justification and warrant an award of attorney's fees

A party to an FCPA enforcement action may recover reasonable attorney's fees if its opponent's claim or defense, or any part thereof: (1) lacked substantial justification; (2) was brought for delay or harassment; or (3) unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures. Colo. Rev. Stat. § 1-45-111.5(2). The ALJ found that the complaint in this case was not yet ripe, and therefore granted the city's motion to dismiss. However, the ALJ denied the city's request for attorney's fees, finding that the complaint did not lack substantial justification. The ALJ explained that it granted the motion to dismiss on a separate legal basis than was argued by the defendants, which "undermine[d] the idea that there was an obvious, objective deficiency in the complaint." In addition, the ALJ noted that the complainant was not an attorney, and therefore could not be expected to function at the same level of legal sophistication. Finally, the ALJ noted a hesitancy to impose attorney's fees against complainants under the FCPA for fear that such awards would chill the ability of private citizens to participate in the strong enforcement of campaign finance requirements enshrined in Article XXVII, Section 1 of the Colorado Constitution. Therefore, the City's request for attorney's fees was denied.

## ***Rutt v. Poudre School District, Case No. OS 2005-003 (Norcross, ALJ)***

### Background:

Several employees of the Poudre School District, who were also members of the local education association, used the district's email and inter-school mail systems to support the partisan campaign of a candidate for the Colorado Senate. The district had previously established a policy prohibiting the use of school facilities and equipment to support or oppose a ballot issue or candidate. When one of the district's board members was notified about the use of district email to support a candidate, the school superintendent investigated the claim. The district's executive director sent a memo to the head of all the education associations involved instructing them not to use district resources to engage in partisan politics.

The education association members continued to use district resources to support the partisan campaign after being instructed to stop. However, the district was not aware that the policy violations were ongoing. Without any further reason to investigate, the district did not monitor the email or inter-school mail communications of the education association members in question. Several months later, a local television station published a story about the members' use of district resources for political campaigning, but district officials believed the story referred to the earlier incidents that had already been addressed.

Holding: The District did not violate the FCPA

1. If a public entity has a reasonable plan in place to prevent FCPA violations by its employees and takes reasonable steps to address any potential FCPA violations it receives information about, then the entity does not violate the FCPA even if its employees act in ways that violate the FCPA without the entity's knowledge.

The ALJ found that the district properly implemented a written policy prohibiting the use of its facilities for political purposes during an election. It also found that the district routinely distributed this policy to district officials and employees. The ALJ found that the district acted reasonably in addressing the violations of the policy that were brought to its attention. Furthermore, the ALJ found that the district reasonably believed that the employees would stop using district resources for unauthorized purposes when instructed to do so.

As a result, the ALJ found that “[the district] cannot and should not be held accountable for [the employees’] disregard of district policy and written directive.” Therefore, the district did not make a contribution to the senate candidate’s campaign and did not violate Section 117 of the FCPA.

## ***Bruce v. School District 11, Case No. OS 2004-0031 (Norwood, ALJ)***

### Background:

A complainant alleged that El Paso County School District 11 violated the FCPA in several ways by promoting passage of two ballot issues. While litigation was pending, the complainant committed several violations of the discovery process.

Holding: The School District was entitled to limited attorney's fees.

1. While a public entity may receive an award of attorney's fees against a complainant in an FCPA action, the amount of that award will be limited to ensure citizens are not discouraged from asserting their rights under the FCPA.

A party to an FCPA enforcement action may recover reasonable attorney's fees if its opponent's claim or defense, or any part thereof: (1) lacked substantial justification; (2) was brought for delay or harassment; or (3) unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures. Colo. Rev. Stat. § 1-45-111.5(2). The ALJ specifically identified \$3,480 of the district's expenses that were caused by the complainant's discovery violations; however, the judge only awarded the district \$1,000. The ALJ explained that Article XXVIII, Section 1 of the Colorado constitution establishes a strong public interest in the enforcement of campaign finance laws. Therefore, the ALJ refused to grant an award over \$1,000 to prevent private citizens from deciding not to bring FCPA enforcement suits out of fear of large fines for failing to follow complicated discovery rules.<sup>4</sup>

## ***Grimaldi v. Town of Mead, Colorado, Case No. OS 2004-024 (Schulman, ALJ)***

### Background:

Prior to an annexation election by the Town of Mead, the mayor used public funds to send a letter to all electors regarding the election. The letter detailed the benefits of the annexation, and stated, "[t]his is clearly the most suitable land use for this very valuable and strategic parcel." In contrast, the letter contained one sentence describing the possible "cons" of the project, which said "[a]s with all annexations, there is the impact of additional traffic and additional demands on municipal services."

Holding: The town did not violate the FCPA.

1. Section 117 of the FCPA does not apply to certain town annexation elections.

The complainant alleged that the mayor's letter violated the FCPA because it was not a balanced factual summary of the election issue and was produced at a cost to the town of more than \$50. However, the ALJ dismissed the complaint, holding that the FCPA did not apply to the election.

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<sup>4</sup> The ALJ awarded the reduced amount even though it recognized that the particular complainant in the case, Mr. Bruce, was a former attorney and was quite familiar with the FCPA.

Section 117 applies to four types of election questions: (1) a state-wide ballot issue that will have a title fixed pursuant to Section 1-40-106; (2) a local ballot issue that will have a title fixed pursuant to Section 31-11-111; (3) a referred measure, as defined in Section 1-1-104; or (4) a recall measure. Colo. Rev. Stat. § 1-45-117(1)(a)(I)(A)-(D). The ALJ held that this annexation election, because of town charter provisions, falls into none of these categories. An annexation election is clearly not a recall measure or a state-wide ballot initiative. Likewise, Section 1-1-104 only applies to referred measures relating to state ballot issues or TABOR. Therefore, the ALJ reasoned, Section 117 could only apply to a town annexation election if it qualified as a local ballot issue pursuant to Section 31-11-11.

The ALJ further explained that while questions titled pursuant to Section 31-11-111 include ordinances generated through citizen petitions, referendums on ordinances adopted by the legislative body of a municipality, and issues the legislative body refers to the electors at its discretion, Section 31-11-111 did not apply to the town's annexation election. The annexation election was not the result of citizen petitions, and was not a referendum on a town ordinance. Furthermore, the ALJ held that the annexation question was not referred to the electors at the town trustees' discretion, because the trustees were required by a voter-approved town ordinance to submit all annexations to a vote. Thus, Mead's annexation election did not fall under any of the categories subject to Section 117 of the FCPA.

***Wimsatt v. Jefferson County Public Schools, District R-1, Case No. OS 2004-018 (Snider, ALJ)***

Background:

Beginning in January 2004, Marlene Desmond, an employee of Jefferson County School District R-1, created brochures and a web site intended to explain the financial status of the school district and garner support for a future mill-levy override and bond issue. The materials were labeled a "Call to Action." Ms. Desmond created these materials during working hours, using public moneys.

On August 19, 2004, the district's board of education referred a mill-levy override and a bond issue to its electors. On August 20, 2004, Ms. Desmond removed all internal links to the "Call to Action" portions of the district's web site and inserted source code to prevent an internet user from accessing the "Call to Action" pages through a search engine.

From August 20 through August 25, the general public could not access the "Call to Action" pages, but an internet user who had previously "bookmarked" those pages could still access them because they were archived on the district's server. On or about August 25, when Ms. Desmond learned that some users could still access the archived pages, she deleted them from the district's server completely.

Ms. Desmond, like several other district employees, was also a member of a group called "Quality Education Drive" ("QED"). QED was a community organization that was not affiliated with the Jefferson County School District. Before the district referred the election issues to the voters, Ms. Desmond, in her capacity as a QED volunteer, copied the "Call to Action" pages from the district's web site onto her personal computer during non-working hours.

She later used these materials to create a web site for QED that advocated voter approval of the mill-levy override and bond issue after the school board referred the issues to the electors. The QED web site was not stored on the district's server. For a short time, the QED web site invited users to contact Casey Mahon, another district employee, via his district email address to receive QED information. Ms. Desmond removed this section of the web site when she became aware of it. Mr. Mahon was not aware that his email address was posted on the QED web site, and he was never contacted via the link.

Holding: Neither the district nor any of its employees violated the FCPA.

1. A government entity need only comply with the FCPA's restrictions on the use of public moneys to advocate or oppose a referred measure after the measure has been referred to the electors.

The FCPA generally prohibits public entities from using public moneys to urge electors to vote in favor or against a referred measure. Colo. Rev. Stat. § 1-45-117(1)(a)(I)(C). However, the ALJ held that, because this restriction only applies to *referred* measures, a government entity is not required to comply with Section 117(1)(a)(I)(C) until the measure is referred to the electors. Therefore, because Ms. Desmond only used public time and resources to create materials urging the public to support the mill-levy override and bond issue *before* the board referred the measures, Ms. Desmond did not violate the FCPA.

2. A government employee may use material that is publicly-available to personally advocate for or against a ballot issue, even if the employee created the material in her role as a government employee.

Ms. Desmond created advocacy materials in her official role as a district employee before the district board referred the issues to the electors. Ms. Desmond subsequently used those materials to create very similar advocacy materials as a volunteer for QED. The ALJ held that this conduct did not violate the FCPA. As discussed above, Ms. Desmond could legally create material advocating public support for the mill levy override and bond issue before the questions were referred. The ALJ held that, once these materials were created, any member of the public could use them as he wished. The district placed no restrictions on the use of the material; therefore, the district did not convey anything of value to QED when Ms. Desmond used the materials on QED's behalf. Ms. Desmond could use the materials for private advocacy in the same way any other person could.

Likewise, the presence of the district's web site address and a district employee's email address on QED's web site did not violate the FCPA. There was no evidence that the information was ever used, and certainly no evidence that the district made any improper contribution or expenditure in connection with QED's web site content.

3. A government employee who acts in good faith to comply with the FCPA and is largely, but not entirely, successful may avoid FCPA liability.

The district's web site contained materials that advocated the passage of the election issues for five days after the issues were referred to the electors. While the district took

steps to ensure that members of the public would no longer reach any advocacy material through its site or through search engines, individuals who had bookmarked the advocacy web pages could still access them. The District did not spend any funds on the advocacy web pages during that time other than those expended to remove the pages. The ALJ held that the advocacy pages' continued presence on the district server for that short time did not violate the FCPA.

4. Standing alone, the possibility of public confusion as to the source of advocacy materials is not enough to support an FCPA violation under Section 117.

The ALJ found that, due to the similarity of the QED web pages and the district web pages, there was a good chance that the public could become confused about which organization was responsible for the QED web site. However, the ALJ held that the district did not violate the FCPA, because a Section 117 violation requires an improper contribution or expenditure, not merely public confusion about content.

### ***Lane v. Kelly, Case No. OS 2004-016 (Norcross, ALJ)***

#### Background:

At a school orientation program in April, 2004, the school's principal encouraged attendees to sign petitions calling for certain land to be included within the Foothills Park Recreation District. A citizen filed a complaint alleging the principal, the school district, and the recreation district violated Section 117 of the FCPA.

Holding: None of the Respondents violated the FCPA.

1. The FCPA only regulates the conduct of public entities regarding ballot measures that have already been submitted or referred.

The prohibitions found in Section 117 of the FCPA do not apply to government entities until a ballot issue has been referred or submitted to have a title fixed. Colo. Rev. Stat. § 1-45-117(1)(a)(I)(B) & (C). In this case, no land inclusion question was submitted or referred before the school orientation meeting where the alleged violations took place. Thus, the ALJ dismissed the FCPA complaint.

### ***Mayfield v. Silver Creek Water and Sanitation District, Case No. OS 2004-003 (Schulman, ALJ)***

#### Background:

On May 4, 2004, an election was held to select board members for the Silver Creek Water and Sanitation District. The candidates included the five current members of the board and five vocal opposition candidates. The opposition candidates formed a political committee that sent out materials criticizing the current board members and their actions.

Shortly before the election, the district sent voters a letter titled, "Are You Interested in The Rest of the Story? (Silver Creek District Responds to Attacks!) (Rest of the

Story letter).” The letter specifically responded to the opposition candidates’ criticisms of the current board’s policies, but did not mention the upcoming election, refer to any of the candidates, or encourage citizens to vote in or take any other action.

Holding: The district did not violate the FCPA.

1. A public entity may create advocacy materials that defend its policies at public expense without violating the FCPA if the materials do not urge electors to vote for or against an issue or candidate.

Section 117 prohibits government entities from making “any contribution in campaigns involving the nomination, retention, or election of any person to any public office.” Colo. Rev. Stat. § 1-45-117(1)(a)(I). The Complainant alleged that the “Rest of the Story” letter was a contribution to the current board members’ reelection effort, and therefore violated Section 117. The ALJ disagreed, holding that the “Rest of the Story” letter was not a “contribution” as defined by statute.

The Colorado constitution defines a “contribution” as “[a]nything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidates nomination, retention, recall, or election.” Colo. Const. art. XXVII, § 2(5)(a)(IV). The ALJ held that the “Rest of the Story” letter was something of value because it was printed on district stationery and mailed at district expense. However, the ALJ held that the letter was not “given, directly or indirectly,” to any candidate or used “for the purpose of promoting the candidate’s . . . election.” The letter did not mention the upcoming election or any candidate participating in it. Instead, the ALJ explained, the letter was a communication from the board to its constituents about its functions, duties, and responsibilities. The ALJ further stated that neither the timing nor the political climate surrounding the letter affected the Section 117 analysis. Therefore, because the letter did not qualify as a contribution, the district did not violate the FCPA.

### ***Simpson v. Baroch for Mayor, Case No. OS 2004-002 (Connick, ALJ)***

Background:

A citizen filed a complaint against several campaign committees operating in the City of Golden.

Holding: The FCPA does not apply to local issues in the City of Golden.

1. A home rule municipality or county may adopt a version of the FCPA as its own election law without using the state FCPA-enforcement measures or recognizing later amendments to the FCPA.

A Colorado home rule municipality or county may opt-out of the FCPA and establish its own requirements for local elections. Colo. Rev. Stat. § 1-45-116. By ordinance, the City of Golden adopted the 2001 version of the FCPA as its own election code. The Complainant attempted to use state FCPA enforcement procedures in a Golden election. The Respondents claimed that Golden had opted out of the FCPA and therefore the ALJ lacked jurisdiction.

The ALJ held that City of Golden did fully apply the FCPA to local elections, but instead adopted the static 2001 version of the FCPA as its own election law. Thus, while Golden's election law is similar to the state law, it is a separate code derived from a separate authority. Golden exercised its prerogative as a home rule city to manage its own elections, and therefore neither the state enforcement procedures, nor any subsequent amendments to the state FCPA applied to Golden elections.

### ***Bolt v. City of Littleton, Case No. OS 2003-015 (Norcross, ALJ)***

#### Background:

In August, 2003, the City of Littleton issued a press release concerning a local ballot initiative to reduce and ultimately repeal a grocery tax. The press release was prepared by city officials during work hours. The Complainant claimed that the press release was an expenditure of public funds for election purposes that violated Section 117.

Holding: The city did not violate the FCPA.

1. Section 117 does not apply to ballot issues titled under the local election laws of a home rule municipality or county.

Section 117 applies to four types of election questions: (1) a state-wide ballot issue that will have a title fixed pursuant to Section 1-40-106; (2) a local ballot issue that will have a title fixed pursuant to Section 31-11-111; (3) a referred measure, as defined in Section 1-1-104; or (4) a recall measure. Colo. Rev. Stat. § 1-45-117(1)(a)(I)(A)-(D).

The City of Littleton is a home rule municipality. As such, it has established its own election code at the city level that applies to local elections. For this reason, the ALJ held that the Littleton tax election did not fall under the first three categories of elections subject to regulation by Section 117. The state-wide ballot issues, local ballot issues, and referred measures covered under Section 117 all occur pursuant to specific state statutes. Because the Littleton grocery-tax election was regulated by city code, not state election law, state statutes did not apply. Therefore, the grocery-tax election was not subject to Section 117 as a state-wide ballot issue, local ballot issue, or referred measure. Likewise, the grocery-tax question was not a recall of a public officer. Thus, the ALJ held, Section 117 did not apply to the grocery-tax election, so the press release did violate the FCPA.<sup>5</sup>

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<sup>5</sup> There may have been a simpler way for the ALJ to dismiss this case, but it is unclear from the opinion. As discussed in *Simpson v. Baroch for Mayor*, Case No. 2004-002, if a home rule municipality or county has its own election regulations that address the same issues as the FCPA, then the FCPA does not apply to local elections in that municipality or county. Therefore, it may have been unnecessary for the ALJ to analyze the specific requirements of Section 117. Instead, the ALJ may have been able to declare that the FCPA did not apply to the entire election because Littleton's own election code governed. In fact, this may have been the city's position, as the ALJ noted "The City argues that . . . § 1-45-117, of the Fair Campaign Practice Act (FCPA) does not apply to the City."

On the other hand, Littleton's election code might have addressed several election procedures, but remained silent with respect to fair campaign practices. In this case, the ALJ may have decided that the FCPA still

## ***Bruce v. City of Colorado Springs, Case No. OS 2003-005 (Schulman, ALJ)***

### Background:

Colorado Springs referred an election question (“Issue 1A”) to its voters to extend a 0.10 percent sales tax to fund a program benefiting trails, parks, and open spaces (“TOPS”). The city sent every active registered voter a pamphlet titled “Factual Summary Under the Fair Campaign Practices Act Provided by the City of Colorado Springs.” The pamphlet contained the ballot language as well as arguments for and against the issue.

The “Arguments For” section was approximately 1 and 1/5 pages long and made several arguments in support of the tax extension, including: (1) the proposed extension from 2009 to 2025 does not increase the tax; the current TOPS tax will sunset April 30, 2009; (2) the proposed extension, during its additional 16 year life span, will generate an estimated \$80 million to \$100 million for TOPS projects, with the idea that by securing matching funds the City may be able to further increase this amount; (3) the extension will allow the City to preserve open space candidate areas such as certain areas specifically named in the Factual Summary; (4) the extension will enable the City to implement approved TOPS master plans, reduce the backlog of underdeveloped parks, playgrounds and ballfields, purchase smaller, neighborhood open space parcels and protect important wildlife habitat and watersheds; (5) the extension allows for up to 3% of the revenue to be used for administration and up to 6% for stewardship and maintenance; (6) all TOPS expenditures are subject to approval by a Citizen Advisory Committee, Parks and Recreation Advisory Board, City Council and are independently audited biannually; and (7) the current 0.1% (one-tenth of a cent) tax costs one cent on every ten dollars spent in Colorado Springs--an annual cost of \$16.00 to the average (area median) household, tourists and other non-residents pay an estimated 40% of the tax--not Colorado Springs residents and the Colorado Springs sales tax rate remains the lowest effective rate among the 10 largest Colorado Front Range cities.

The “Against” section was approximately 4/5 of a page and made several arguments against the tax extension, including: (1) “Much of the land preserved as open space under the current TOPS program could have been developed to provide housing and commercial facilities for the City’s growing population;” (2) If not extended the TOPS tax will sunset in 2009, thus making an additional \$16.00 available annually to the median Colorado Springs household after 2009; (3) If TOPS is not extended, various named scenic properties can be developed to meet the City’s housing and commercial space needs for a growing population; (4) Issue 1A will cost taxpayers between \$80 million to \$100 million; (5) The City’s trails and parks development programs, as well as the 3% management allowance and 6% maintenance/stewardship allowance, can be paid for out of the City’s general fund; (6) The anticipated revenues will be insufficient to fully fund the current TOPS master plans which

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applied to the election because Littleton did not have regulations that “address the matters covered by article XXVII and [the FCPA].” Colo. Rev. Stat. § 1-45-116. Unfortunately, the ALJ did not explain its reasoning on this point.

In short, a home rule municipality seeking to avoid Section 117 may have two possible routes. First, it could argue that the entire FCPA is inapplicable. *See Simpson v. Baroch for Mayor*. Second, it could argue that even if the FCPA applies, the election does not fall under any of the Section 117 categories because it is governed by city code and not state law. *See Bolt v. City of Littleton*.

extend only to 2010; (7) “Non-city residents will pay approximately 40% of the extended TOPS tax;” and (8) City open space needs could be met by utilizing the 1.2 million-acre Pike National Forest.

Holding: The city did not violate the FCPA.

1. Section 117 only regulates the conduct of public entities, not individuals.

The Complainant named several individuals as Respondents. Those individuals moved to dismiss the complaint against them, claiming that Section 117’s prohibitions only apply to public entities, not individual employees. The ALJ agreed. Section 117 states that “no agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof” may make certain political contributions. Colo. Rev. Stat. § 1-45-117(1)(a)(I). Missing from this prohibition is any reference to individuals, including public employees. The ALJ held that the meaning of the statute was clear and unambiguous, and therefore no further analysis was needed. A public entity may violate Section 117 through an individual acting as the entity’s agent, but statute does not regulate individuals directly.

2. Colorado Springs’s pamphlet complied with the “factual summary” requirements of Section 117 and thus did not violate the FCPA.

The parties stipulated that Section 117 applied to the tax-extension election. Section 117 expressly allows public entities to dispense a factual summary about an election issue that contains arguments for and against the measure and does not contain a conclusion or express an opinion on the matter. Colo. Rev. Stat. § 1-45-117(1)(b)(I). The ALJ held that Colorado Springs’s summary was permissible under this subsection.

The ALJ stated that, in order to be a proper factual summary, the mailing must be facially neutral and must not urge electors to vote for or against an issue. A summary can violate this section without an explicit “vote yes” or “vote no” if the information is not balanced and even-handed.<sup>6</sup> The ALJ held that the Colorado Springs summary met this standard.

Complainant argued that the city’s economic forecasts in the “Arguments For” section were so unreliable that they constituted a “vote yes” endorsement by the city. However, the ALJ stated that the forecasts were rationally based and neutral, and therefore they did not qualify as advocacy. Complainant argued that S.B. 98-171 established that any tax extension is a tax increase, and therefore the portion of the summary that said the issue would not increase taxes was false. The ALJ rejected this contention, stating that S.B. 98-171 only referred to the Metropolitan Football Stadium District, and was not a broader proclamation by the General Assembly.

Finally, Complainant alleged that the “Arguments Against” section did not contain the most persuasive arguments against the measure, did not competently explain the arguments that it did contain, and did not reflect opponents’ input. The ALJ held that, although the “Arguments Against” section could have been more effective, it was sufficient and adequate

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<sup>6</sup> The Colorado Court of Appeals reached the same conclusion in *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140, 1143-1144 (Colo. App. 2004).

to meet the requirements of Section 117. Likewise, the ALJ stated that while a good practice would be to invite the opponents of a measure to contribute to the “Arguments Against” section, the FCPA does not require public entities to use opponents’ input. Therefore, the City of Colorado Springs did not violate the FCPA in publishing its factual summary.

***Carter v. Committee to Elect Rob Fairbank, Case No. OS 2002-025 (Connick, ALJ)***

Background:

A state representative’s election committee listed the representative’s official telephone number in its election materials.

Holding: The representative did not violate the FCPA.

1. A political committee’s listing of a government telephone number in campaign literature does not violate Section 117.

The ALJ did not give extensive reasoning for its decision, but as *Bruce v. Kreamer*, Case No. OS 2003-005, shows, Section 117 only applies to public entities, not private campaign committees.

***Shroyer v. Hill, Case No. OS 2002-024 (Schulman, ALJ)***

Background:

Helen Hill, the departing Adams County Treasurer, sent a letter to voters endorsing Clyde Spero, one of the candidates seeking to replace her. She received no compensation for writing the letter and completed it during her personal time. No public resources were used to print or mail the letter. The letter contained her name, her title as Adams County Treasurer, a link to the Adams County website, and a replica of the Adams County Seal. The county held a registered trademark on the county seal, but did not place any restrictions on its use.

Holding: The county treasurer did not violate the FCPA.

1. The county treasurer did not violate Section 117 by sending a privately-funded advocacy letter that referenced the county web site and used the county seal.

The Complainant alleged that Ms. Hill expended public moneys in support of a candidate in violation of Section 117. The ALJ disagreed. No county resources were used to produce or send the letter. Instead, the entire process was coordinated and funded by private sources. Likewise, Ms. Hill’s act of writing the letter did not violate Section 117 because “services provided without compensation by individuals volunteering their time on behalf of a candidate” are not considered a contribution under the FCPA. Colo. Rev. Stat. § 1-45-103(4)(a)(IV).

The Complainant argued that the private letter violated Section 117 because Ms. Hill's letter listed the county web site and contained a replica of the Adams County Seal. The ALJ disagreed. The judge held that the web address was not something of value, but instead a piece of identifying information like an address or telephone number. Moreover, Ms. Hill did not use any special rights as the county treasurer to obtain the address, which was publicly available. Therefore, Ms. Hill did not direct any public funds to Mr. Spero's campaign by listing the county web site address on her letter.

Similarly, Ms. Hill did not direct any public funds to Mr. Spero's campaign by including a replica of the county seal in her letter. The county registered the seal as a trademark, and indicated in the trademark application that the seal was used for "County business." However, the county never placed any restrictions on the use of the seal, and it appeared in publications by other candidates, political parties, and citizen organizations. Moreover, officials in Mr. Spero's campaign, not Ms. Hill herself, placed the seal on the letter. They did not obtain the seal from Ms. Hill, but instead copied it from another private web site. Thus, Ms. Hill did not contribute any funds to Mr. Spero's campaign.

2. The FCPA does not prohibit actions that appear to contribute public funds to a candidate when no contribution actually occurs.

Section 117 prohibits actual contributions or expenditures of public funds, not actions that merely create the appearance that public moneys have been used.. The ALJ refused to extend the FCPA beyond its text, holding that an actual contribution or expenditure is necessary for an FCPA violation.

***Skruch v. Highlands Ranch Metropolitan Districts Nos. 1-5, Case No. OS 2002-019 (Norwood, ALJ)***<sup>7</sup>

Background:

In early 2002, the Highlands Ranch Metropolitan Districts 1 through 5 (the "districts") approved the expenditure of funds for the preparation, printing and mailing of a brochure that explained the proposed improvements. The brochures were mailed to Highlands Ranch residents on August 22, 2002. On August 27, 2002, the districts fixed the title of a ballot initiative calling for an election authorizing the issuance of general obligation bonds to finance the proposed improvements. The districts also had prepared "vision boards" or posters with thick backing for display purposes. There was no evidence of when the vision boards were paid for by the districts. The vision boards were given to the committee supporting the ballot issue some time after August 27, 2002.

The districts contracted for the preparation of the brochures in July 2002 and actually mailed the brochures on August 22, 2002. On August 27, 2002, the districts fixed a ballot title for a bond issue to support the amenities. On August 29, September 13, and October 25, 2002, the district used public moneys to pay for the expenses incurred in creating the

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<sup>7</sup> This decision was affirmed by the Court of Appeals in *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140 (Colo. App. 2004).

brochures and vision boards that had previously been created. The districts and the ALJ agreed that August 27, 2002 was the date the ballot issue was submitted for the purpose of having title fixed pursuant to Section 31-11-111, C.R.S., and that expenditures after that date violated the FCPA.

Holding: The districts violated the FCPA.

1. Under Section 117, a public entity may not spend public moneys on advocacy material regarding a ballot question after a title has been fixed, even if the material was distributed before the issue was titled.

The ALJ first surmised that the brochures and vision boards paid for by the districts were advocacy pieces. The judge stated that the brochures and vision boards were “entirely positive” descriptions of the four projects and contained no arguments against the projects. Further, the judge found that “as a positive document, the brochure had the effect of encouraging Highlands Ranch residents to support the four projects.” Although the brochures did not specifically address the ballot issue number, and the title had not been set, the expenses related to the creation of the brochures were issued after the ballot title had been set. Consequently, the expenditures constituted an expenditure of public money to urge electors to vote in favor of the ballot issue.

While the districts created materials advocating the issuance of bonds, they did not distribute any of these materials after fixing a title on the ballot issue. Generally, the limitations on using public moneys for advocacy in Section 117 do not apply until a title has been fixed pursuant to Section 31-11-111, C.R.S. Although the districts did not distribute any advocacy material after the title was set, they used public moneys to pay the expenses incurred in creating the materials they distributed earlier. The ALJ held that these expenditures violated Section 117.

The districts argued that the checks fell outside the definition of “expenditure” found in the Colorado statutes. Section 1-45-103(6) states that “expenditure occurs when the actual payment is made or when there is a contractual agreement an the amount is determined” (emphasis added). The districts argued that their payment of the brochure costs fell under the second clause, not the first, because they made a contract to pay for the services before the title was fixed. The ALJ disagreed. First, it held that Section 1-45-103(6) applies to political committees, not public entities. Second, the ALJ interpreted the word “or” to mean that *either* making a payment or signing a contract after a ballot title has been fixed will violate the FCPA. Therefore, even if Section 1-45-103(6) applied to the districts, their Section 117 violations would stand.

The ALJ fined the districts \$300 -- \$100 for each payment made after the title was fixed. The ALJ explained that a higher penalty would be counterproductive, as the citizens of Highlands Ranch would have to pay for the districts’ mistakes.

2. Under the pre-2002 version of the FCPA, a public entity may make a donation in-kind to a political committee after a ballot title has been fixed for an issue without violating Section 117.

The ALJ also held that a public entity could donate property to a political committee without violating Section 117 because at the time, Section 117 did not prohibit public entities from making contributions in-kind. However, recent amendments to the Colorado Constitution eliminated the distinction between contributions and contributions in-kind. *See* Colo. Const. Art. 28, § 2(5)(a). Thus, this section of the ALJ opinion does not apply to cases arising after the 2002 FCPA revisions.

***Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4, 107 P.3d 1140 (Colo. App. 2004).***

Background:

The ALJ held that the Highlands Ranch Metropolitan Districts violated the FCPA (see above). The districts appealed.

Holding: The districts violated the FCPA, judgment affirmed.<sup>8</sup>

1. A public entity need not use express terms such as “vote for” or “vote against” to urge electors to vote in favor of or against an issue in violation of Section 117.

Prior to this case, at least one ALJ decision held that Section 117 violations had to meet the “express advocacy” standard set out in *Buckley v. Valeo*, 421 U.S. 1 (1976). *See Bruce v. Owens*, Case No. OS 1999-005. However, the Court of Appeals stated here that a public entity can violate Section 117 without using express language such as “vote for” or “vote against.” The Court of Appeals distinguished *Buckley* and *League of Woman Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001), as in both cases the question was relating to the election of identified candidates. The cases did not interpret the provisions of the FCPA at issue in this case.

2. The pre-2002 definition of “expenditure” in the FCPA does not apply to public entities.

Prior to this case, at least one ALJ decision held that because the definition of “expenditure” from the FCPA only referred to issue committees, a public entity could only violate Section 117 by expending funds if it involved an issue committee in the process. *See Wilder v. Falcon School District 49*, Case No. OS 1998-045. The Court of Appeals noted that the FCPA’s definitions were modified in 2002, (*See* Colo. Const. art. XXVII, § 2), and held that the earlier definition of “expenditure” did not apply to political subdivisions such as the Highlands Ranch Metropolitan Districts.

***Muller v. Burkholder, Case No. OS 2002-012 (Schulman, ALJ)***

Background:

Steve Burkholder, the Mayor of the Lakewood City, wrote a letter on city stationery endorsing the candidacy of Sam Zakhem for a congressional primary election. The mayor spent \$2.35 in city funds on the letter.

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<sup>8</sup> Unless noted, the Court of Appeals agreed with the reasoning of the ALJ.

Holding: The Mayor violated the FCPA.<sup>9</sup>

1. The fifty-dollar exception to Section 117 does not apply to candidate campaigns

The Mayor argued that he did not violate the FCPA because, in certain circumstances, a public official that has policy-making responsibilities may use up to \$50 in public moneys to express his opinions via telephone calls, letters, or other activities. Colo. Rev. Stat. § 1-45-117(1)(a)(II). However, the ALJ held that this exception only allowed officials to express their views on ballot issues, not candidate campaigns. The exception states that an official may spend up to fifty dollars on “activities incidental to expressing his or her opinion *on any such issue* described in paragraph (I) of this paragraph (a).” Colo. Rev. Stat. § 1-45-117(1)(a)(II) (emphasis added). The ALJ explained that this and other language in Section 117 shows that the fifty-dollar exception only applies to ballot issues, and not candidate campaigns.

2. A public official cannot necessarily negate an FCPA violation by simply reimbursing the public entity for the illegal contribution.

After the letter was distributed, the mayor repaid the city the \$2.35 he used to create the letter. The ALJ stated that while this showed good faith, it did not cure the underlying violation. The Complainant was only seeking a declaration that the mayor had violated the law, and the ALJ granted the Complainant’s request.

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<sup>9</sup> While the issue was not raised in this case, other cases have noted that Section 117 of the FCPA does not apply to individuals, only to public entities. See *Bruce v. City of Colorado Springs*, Case No. OS 2003-005; *Ferguson v. Morton*, Case No. OS 1997-07. One subsequent case refused to apply Section 117 to this same defendant on grounds that he is an individual. See *Smith v. Burkholder*, Case No. 20050026.

## ***Olson v. City of Golden, Case No. OS 2001-016 (Connick, ALJ)***

### Background:

The City of Golden passed resolutions and posted information on its website entitled “Sales Tax Exemption of Food, Liquor and Restaurant Sales - Frequently Asked Questions” about a proposed charter amendment.

Holding: The city did not violate the FCPA.

1. Section 117 does not apply to elections that seek to amend the charter of a home rule municipality.

The Complainant alleged that several of Golden’s actions violated Section 117. However, Section 117 only applies to local ballot issues that have a title fixed pursuant to Section 31-11-111. Colo. Rev. Stat. § 1-45-117(1)(a)(I)(B). The charter amendment election in this case had a title fixed pursuant to Section 31-2-201. Therefore, the ALJ held that Section 117 did not apply, and the city did not violate the FCPA.

The ALJ also noted that the city passed a resolution stating that municipal elections would be held in accordance with the FCPA. However, the ALJ did not interpret this general reference as applying the FCPA to ballot issues that would not otherwise be covered.

## ***Schneiderman v. Town of Gypsum, Case No. OS 2001-015 (Muramoto, ALJ)***

### Background:

In August, 2001, Tom Edwards, a Gypsum town council member, wrote an article titled “Chatfield Corners Letter to Residents.” The letter described the potential ramifications of annexing property known as Chatfield Corners. The town published the letter in the September edition of the “Gypsum Chronicles,” a quarterly newsletter sent to town residents. The town mailed the newsletter on September 7, 2001.

On August 31, 2001, the Complainant filed three petitions with the Gypsum Town Clerk that addressed the Chatfield Corners annexation. Two of the petitions were initiated ordinances, and one was a referendum on an ordinance passed by the town council. On September 11, 2001, the town council called a special election to decide the issues submitted by the Complainant. On October 11, 2001, the *Vail Daily* reprinted Mr. Edwards’s letter after he submitted it to the paper on his own time.

Holding: The city did not violate the FCPA.

1. Section 117 does not apply to a citizen-initiated ordinance or referendum until the municipality’s council orders an election on the issue.

Section 117 generally prohibits municipalities from expending public moneys to support or oppose a local ballot issue once it has been “submitted for the purpose of having a title fixed pursuant to section 31-11-111.” Colo. Rev. Stat. § 1-45-117(1)(a)(1)(B). The Complainant

argued that the ballot issues addressing the Chatfield Corner annexation were “submitted” for the purpose of this section when she filed her petitions with the town clerk. The ALJ disagreed. Instead, the ALJ held that the Section 117 was not triggered until the town council ordered an election on the issues. Because the town mailed the newsletter on September 7, and did not set an election on the initiatives and referendum until September 11, the newsletter did not violate the FCPA.

Alternatively, the ALJ held that the town council member’s letter was an unbiased factual summary authorized by the FCPA in Section 1-45-117(1)(b)(I). The letter presented arguments for and against the annexation that were roughly equivalent in length. Moreover, the letter stated, “[t]he answer is something you will have to decide for yourself,” and concluded, “[t]he suggestion of the Town Council would be to vote for Council members at the next election that you feel represent your desires.” Thus, the ALJ explained, the letter also fit within the “factual summary” exception to Section 117.

2. Section 117 does not apply to a public official’s expression of his personal opinion.

Finally, the ALJ offered a third justification for the letter with respect to its republication in the *Vail Daily* after a ballot title had been fixed. The ALJ explained that when Mr. Edwards submitted his letter to the paper, he did so on his own time and without the knowledge or approval of the town, and, therefore, did not violate Section 117. The ALJ stated that these actions were covered by the personal opinion exception found in Section 1-45-117(1)(b)(II).

***Beer v. City of Loveland, Case No. OS 2001-012 (Schulman, ALJ)***

Background:

The City of Loveland referred two ballot measures to its voters on September 4, 2001, one involved an excise tax, and the other authorized the city to spend money that would otherwise be refunded under TABOR. The city spent a significant amount of public moneys on materials that urged city residents to support both measures, but all expenditures occurred before the measures were referred on September 4.

Holding: The city did not violate the FCPA.

1. Section 117 does not apply to public expenditures that occur before an issue is submitted for the purpose of having a ballot title fixed.

The prohibitions on public spending in Section 117 apply to local ballot issues that have been submitted for the purpose of having a ballot title fixed. Colo. Rev. Stat. § 1-45-117(1)(a)(I)(B). However, Section 117 does not regulate public expenditures before a title is fixed. Therefore, because expenditure of public funds for advocacy occurred before the city referred the local ballot issues to the electors, the city did not violate Section 117.

***Colorado Common Cause v. Coffman, Case No. OS 2001-002 (Norwood, ALJ)***<sup>10</sup>

Background:

Mike Coffman, the Colorado State Treasurer, issued three press releases criticizing a state-wide ballot issue known as Amendment 23 and urging electors to vote against it. These press releases were composed and edited by his staff members as part of their official duties. Faxing and copying the press releases cost \$17, and the staff time spent creating the press releases cost \$200.16.

Holding: The State Treasurer violated the FCPA.

1. When an elected official expresses his opinion on an issue, all the staff time he utilizes counts against the FCPA's fifty-dollar exception.

Section 117 allows policy-making officials to spend fifty dollars of public moneys on letters, telephone calls, or other activities incidental to expressing their opinions a ballot issue. Colo. Rev. Stat. § 1-45-117(1)(a)(II). In this case, while the treasurer's office only spent \$17 publishing the press releases, the ALJ counted the staff time spent preparing the releases against the fifty-dollar limit. The ALJ used the employees' salary and average work week to set an hourly rate for each staff member, and multiplied that rate by the hours spent on the press releases to reach a total amount of public moneys spent.

The treasurer argued that not all the staff time should be counted against the limit, because in addition to participating in public advocacy, the staff members were also analyzing Amendment 23 for internal purposes. Because internal analysis is not regulated by Section 117, the treasurer argued, not all of the staff time spent on the press releases should be considered for FCPA purposes. The ALJ disagreed. The ALJ explained that each of the press releases was intended solely to communicate the treasurer's position to the public, and none took the format of an internal government memorandum. None of the staff time was dedicated to impartial analysis, but instead it was entirely dedicated to urging opposition to Amendment 23. If this type of direct advocacy could be written off as "internal-memoranda," the ALJ reasoned, then the FCPA's restrictions would be meaningless. The ALJ counted all of the staff time dedicated to preparing the press releases against the fifty-dollar limit, and therefore the treasurer's office exceeded that limit in violation of Section 117.

2. Press releases issued by a public official that are not the result of a vote of more than one person are not "resolutions" for purposes of the Section 117 exception.

A government entity may use public funds to report the passage of a resolution for or against a ballot measure without violating the FCPA. Colo. Rev. Stat. 1-45-117(1)(b)(III)(B). The treasurer argued that the press releases did not violate the FCPA because they fell under this "resolutions" exception. The ALJ disagreed. The ALJ held that a resolution requires the action of a public body of more than one person, usually by a vote. The State Treasurer is the sole

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<sup>10</sup> This decision was affirmed by the Court of Appeals in *Colorado Common Cause v. Coffman*, 85 P.3d 551 (Colo. App. 2003), which was affirmed by the Colorado Supreme Court in *Coffman v. Colorado Common Cause*, 102 P.3d 999 (Colo. 2004).

policy-making official of the Treasury department, and no vote was taken with respect to the press releases. The treasurer argued that the release should be considered *ipso facto* resolution, but the ALJ explained that such a rule would eviscerate Section 117. If any statement of opinion by a public official using public funds was considered a resolution, then Section 117 would not meaningfully restrict the actions of state officers. The ALJ rejected this interpretation and held that the treasurer's actions did not fall under the resolutions exception.

***Colorado Common Cause v. Coffman, 85 P.3d 551 (Colo. App. 2003).***

Background:

The ALJ held that the State Treasurer violated the FCPA (see above). The treasurer appealed.

Holding: The treasurer violated the FCPA, judgment affirmed. The reasoning of the Court of Appeals was substantially similar to the ALJ's (see above).

***Coffman v. Colorado Common Cause, 102 P.3d 999 (Colo. 2004).***

Background:

The ALJ held that the State Treasurer violated the FCPA (see above). The Court of Appeals affirmed (see above). The treasurer appealed.

Holding: The treasurer violated the FCPA, judgment affirmed.<sup>11</sup>

1. FCPA application involves statutory interpretation, not analysis of government officials' constitutional speech rights.

The State Treasurer argued that as an elected state leader, he was permitted and required by state law to take leadership positions on financial issues. The court explained that Section 117 did not restrict the treasurer's constitutional speech rights, but instead limited the ways his office could spend state funds. Therefore, the court interprets Section 117 using tools of statutory interpretation, not constitutional analysis.

2. The State Treasurer's official duties do not make the office exempt from complying with Section 117's restrictions on the use of public funds.

The court acknowledged that the State Treasurer has broad duties in caring for public funds and reporting the condition of the state treasury. The treasurer suggested that the FCPA did not prohibit his commenting on pending ballot issues as a part of these duties. The Supreme Court disagreed. The court explained that while the treasurer's office did have several reporting obligations, it was not generally required to keep the public apprised about the financial status of the state. Moreover, even if the treasurer had some generally duty to inform

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<sup>11</sup> Unless noted, the Supreme Court agreed with the reasoning of the ALJ and the Court of Appeals. Justice Coats dissented, and filed an opinion.

the public, the court held that there was no constitutional or statutory support stating that this duty would include advocating the support or defeat of pending ballot measures. Thus, the court held that the state treasurer was required to fully comply with the FCPA.

3. Time spent by a public official's staff is a contribution of public moneys for FCPA purposes.

The court held that the time the treasurer's staff spent creating advocacy materials qualified as a contribution in kind for FCPA purposes. Contributions in kind include paid services, and, in this case, the payment for the staff members' services came from the State of Colorado. Therefore, the treasurer directed a contribution in kind to urge electors to vote against a state-wide ballot issue. The court adopted the ALJ's valuation of staff members' time.

***Bruce v. Mullen, Case No. OS 2000-008 (Snider, ALJ)***

Background:

After "Amendment 21," a state-wide ballot initiative had a ballot title fixed, the Colorado Springs City Council passed a resolution opposing the amendment. The council directed City Manager James Mullen to publicize the passage of the resolution. Mullen mailed 200 people a copy of the resolution and a cover letter noting the "devastating effect" that Amendment 21 would have on local government. In addition, Mullen included some of the materials that the council reviewed in considering the resolution, such as an analysis of the negative fiscal impact of Amendment 21, a memorandum including material from the "No on Amendment 21" campaign, and a memorandum from a law firm on the effects of the Amendment 21 tax cuts.

Colorado Springs did not routinely send council resolutions and background materials to these 200 people. Instead, the city generally issued a press release and posted material on the internet.

Holding: The city violated the FCPA.

1. A public entity can violate Section 117 without expressly using terms such as "vote yes" or "vote no."

Colorado Springs argued that the ALJ should adopt a test for Section 117 similar to the United States Supreme Court's test in *Buckley v. Valeo*, 421 U.S. 1 (1976). There, the Supreme Court stated that campaign finance laws could only regulate communications that explicitly used phrases such as "vote for," "elect," "cast your ballot for," etc. The ALJ rejected this argument, explaining that the *Buckley* test was designed to protect individual's First Amendment rights from government interference, while Section 117 sets a policy for government itself. Absent any constitutional concerns, the ALJ concluded Section 117 was intended to ensure full government neutrality. Therefore, because the overall message of the city's mailing was that the city council believed Amendment 21 should be defeated, the mailing

violated Section 117.<sup>12</sup> The ALJ recognized that an earlier ALJ opinion took a different approach, but chose not to follow that decision. *See Bruce v. Owens*, Case No. OS 1999-005.

Moreover, the ALJ noted that one of the third-party documents included in the mailing explicitly used the phrase “No on Amendment 21.” Thus, even if the *Buckley* rule applied to Section 117, the mailing would still have violated the law, as the “overall tenor” of the communication was that the city council believed that Amendment 21 should be defeated.

2. A public entity that publishes a resolution more extensively than is customary and includes information beyond the resolution itself is not protected by the “resolutions” exception to Section 117.

Section 117 does not prohibit public entities from passing a resolution for or against a ballot issue or publicizing the passage of that resolution through customary means. Colo. Rev. Stat. § 1-45-117(1)(b)(III). However, the ALJ held that Colorado Springs’s mailing did not fall under this exception. First, Section 117 only authorizes a public entity to report the passage of a resolution, but Colorado Springs also mailed other supporting documents. Second, Section 117 only authorizes public entities to report the passage of a resolution through customary means, but Colorado Springs sent the resolution directly to 200 recipients. This was not the city’s common practice. Finally, Section 117 authorizes a public entity to report the passage of the resolution to “the public,” but Colorado Springs only sent its mailing to 200 select individuals. Therefore, the ALJ held that the city’s actions were not authorized by the “resolutions” exception to Section 117.

### ***St. John v. Arvada City Council*, Case No. OS 2000-001 (Harr, ALJ)**

#### Background:

The City of Arvada placed a charter amendment on its 1999 ballot pursuant to a citizen initiative called “Issue 200.” The city council also referred a separate question to the voters labeled “Question 2A.” Question 2A was a non-binding advisory question that asked voters how they would like the city to pay for the legal liability costs that might arise if Issue 200 passed.

Holding: The city did not violate the FCPA.

1. Section 117 does not apply to a ballot question that refers to a separate issue but does not urge electors to vote or against that issue.

Section 117 generally prohibits public entities from spending public moneys to urge voters to approve or reject a ballot issue. The Complainants argued that the city violated this section by placing a second question on the ballot that misrepresented the anticipated costs and benefits of Issue 200. The Complainants alleged that the city council intended to undermine Issue 200 with Question 2A, but they did not allege that the city council urged electors to vote in

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<sup>12</sup> The Colorado Court of Appeals reached the same conclusion in *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140, 1143-1144 (Colo. App. 2004).

favor of or against Issue 200. The ALJ held that the Complainants failed to state a claim under Section 117 because the law only prohibits public entities from advocating for or against a ballot issue, not simply “undermining” an issue in a general sense.

### ***Cipolla v. Kastendieck, Case No. OS 1999-014 (Schulman, ALJ)***

#### **Background:**

The Park School District referred a ballot issue to its electors regarding a mill levy override. After the referral, an independent group known as Partners for Quality Education (“PQE”) created fliers urging electors to approve the override. The fliers were sent home with children from school. The evidence did not show how the fliers were distributed to the children.

The mill levy override was intended to cure an anticipated budget shortfall within the school district. The superintendent of the district, who was also a member of PQE, met with students and adult members of the community to discuss the budget shortfall. The evidence did not show that he advocated the passage of the override in these meetings.

One of the teachers within the district sent an email to her co-workers on the district email system that urged support for the mill levy override. The evidence did not show that she sent the email during work hours instead of her free time, or that the district had any policy against employees using the email system to express their personal views.

**Holding:** None of the district employees violated the FCPA.

1. Government officials do not necessarily contribute to an independent political organization simply because materials created by that organization are distributed on government property.<sup>13</sup>

Section 117 generally prohibits public entities from expending funds or making contributions that urge electors to vote for or against a ballot issue. Colo. Rev. Stat. § 1-45-1171(a)(I). The Complainants argued that school officials violated this section because materials prepared by PQE that urged voters to support the mill levy override were distributed at school. The ALJ held that Complainants failed to establish an FCPA violation. The ALJ first noted that no evidence suggested any public funds were used to create or distribute the fliers. The ALJ further explained that the distribution itself did not qualify as a “contribution” under the definitions found in Colorado law.<sup>13</sup> Thus, the PQE fliers did not establish an FCPA violation by school officials.

2. A public official does not violate Section 117 by simply discussing subject matter relating to a ballot issue with individuals who are eligible to vote.

The school superintendent met with students and adults to discuss the budget shortfall facing the district. The ALJ held that these conversations did not constitute FCPA

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<sup>13</sup> This section of the opinion relies heavily on the definition of “contribution” that was in effect at the time. That definition has subsequently been expanded. *See* Colo. Const. Art. 28, § 2(5)(a). Therefore, the value of this analysis may be diminished for subsequent cases.

violations for two reasons. First, there was no evidence to suggest the conversations occurred during work hours as opposed to the superintendent's free time. Thus, the Complainants did not establish that any of the superintendent's salary should be considered. Second, and more importantly, there was no evidence to suggest that the superintendent ever discussed the mill levy override or urged anyone to support it. His conversations were generally focused on the larger budget situation facing the school, and there was no evidence that he engaged in the type of advocacy prohibited by Section 117.

3. A public official does not violate Section 117 by simply expressing her personal opinion on a ballot issue via a public entity's email system.

A district teacher sent an email to her colleagues supporting the mill levy override. The ALJ held that this email did not violate the FCPA. The evidence did not show that she wrote or sent the email during her work hours as opposed to her free time. Thus, the Complainants did not establish that any of her salary should be considered. In addition, the Complainants did not present any evidence that the district suffered any additional cost due to her email. Therefore, the Complainants failed to show that the teacher's email was an expenditure of public moneys to support the mill levy override.

### ***Bruce v. Owens, Case No. OS 1999-005 (Stuber, ALJ)***

#### Background:

On June 2, 1999, Governor Bill Owens signed H.B. 99-1325, which set a referred measure known as "Referendum A" for the November 1999 ballot. The referendum asked electors to authorize bonds that would fund certain highway projects.

Pursuant to the Colorado Constitution, several members of the governor's staff participated in the creation of the "Blue Book." The governor's staff members sent suggestions to the Office of Legislative Council on several occasions. All of these communications came in response to requests for comment from the Legislative Council.

Governor Owens regularly spoke in favor of Referendum A in the weeks leading up to the election. He was transported to many of his public appearances using state vehicles, and was protected at many of these events by state security officers.

Tom Norton, the executive director of the Colorado Department of Transportation ("CDOT") wrote two articles explaining the benefits of Referendum A. While neither expressly urged electors to vote for Referendum A, they clearly advocated the passage of the issue. One of these articles was published in a private newspaper, the other in a newsletter created by CDOT and distributed to its employees.

Holding: None of the respondents violated the FCPA.

1. A state official's staff members do not violate Section 117 by participating in Colorado's Blue Book preparation process.

The Complainant argued that the governor's staff members violated Section 117 by submitting comments that advocated passage of Referendum A to the Office of Legislative Council for consideration in the Blue Book process. The Colorado Constitution requires the General Assembly's research staff--currently the Legislative Council--to prepare a booklet containing a fair and impartial analysis of any referred measure, and specifically states that "[a]ny person may file written comments for consideration by the research staff during the preparation of such analysis." Colo. Const. art. V, § 1(7.5)(a)(II). The ALJ held that the governor's staff members could submit comments as part of this process without violating the FCPA for several reasons.

First, the ALJ noted that Section 117 only prohibits public entities from spending public moneys "to urge electors to vote in favor of or against" a referred measure. The comments sent by the governor's staff to the Legislative Council were not submitted to the voters and did not urge voters to approve or reject Amendment A. Instead, the comments went to the Legislative Council for its consideration in creating a fair and impartial summary of the referendum. The final authority for the Blue Book language remained with the Legislative Council. Because the governor's staff did not make the statements to the electorate, the ALJ held that the comments did not violate Section 117.

Second, the Blue Book process is enshrined within the Colorado Constitution and specifically authorizes any person to file written comments. The ALJ construed the FCPA to avoid constitutional infirmities by allowing the governor's staff to participate in the Blue Book process.

Finally, the ALJ found that all of the comments submitted by the governor's staff in the Blue Book process were direct responses to requests from the Legislative Council. Section 117 does not apply to public employees' answers to unsolicited questions. Colo. Rev. Stat. § 1-45-117(1)(a)(II). Therefore, the governor's staff members' responses to the Legislative Council's requests were not covered by the FCPA.

2. The governor does not violate Section 117 by expressing his opinions about a ballot issue as a part of his customary activities.

In the months leading up to the November, 1999 election, the governor often spoke in favor of Referendum A at his public appearances. The Complainant alleged that this advocacy by the governor violated Section 117. The ALJ disagreed, explaining that security and transportation costs were the only significant public expenses incurred for the governor's appearances. Those items are specifically exempted from the FCPA. *See* Colo. Rev. Stat. § 1-45-117(2). The ALJ cited other administrative decisions for the proposition that although the governor is a public servant, his time is not considered a state resource for FCPA purposes. Further, the ALJ held that any staff time dedicated to assisting the governor in expressing his views was *de minimis* and did not violate the FCPA. The governor may instruct his staff to provide him with information about issues facing the state without running afoul of Section 117. Finally, the ALJ held that the governor was not responsible for FCPA violations by members of his staff absent a showing that he ordered the conduct that led to the violation.

3. A public official may avoid an FCPA violation by advocating the passage of an issue without expressly urging electors to vote in favor of the issue.<sup>14</sup>

The ALJ held that neither of Mr. Norton's articles violated the FCPA because they never expressly urged voters to vote for the amendment. The ALJ adopted the reasoning of the United States Supreme Court in *Buckley v. Valeo*, 421 U.S. 1 (1976), and stated that a public official does not violate the FCPA without an explicit call to vote for or against an issue.<sup>14</sup> The ALJ further held that printing and distributing the advocacy section of the CDOT newsletter was not an expenditure of public funds because the printing and mailing costs would have been the same with or without the advocacy.<sup>15</sup>

Likewise, the ALJ held that Norton did not violate the FCPA by discussing Referendum A at his public appearances. There was no evidence that he ever expressly urged electors to vote for the issue, and therefore there was no FCPA violation.

### ***Wilder v. Falcon School District 49*, Case No. OS 1998-045 (Biddle, ALJ)**

#### Background:

The Falcon School District referred a bond issue to its electors sometime before mid-September 1998. Shortly after the question was referred, a group of citizens, including many district employees, formed the Commitment for Kids Committee to advocate the passage of the bond issue.

The committee designed and printed "blue cards" that urged people to support the bond issue and to volunteer with the campaign. The district superintendent distributed these cards to schools after 5 pm and at a meeting for administrators. The cards were available in school lobbies and teachers handed them out at parent conferences.

The superintendent sent a memo to all principals stating, "Please include a reminder with any correspondence you send to parents between now and November 3, to vote on November 3 for the \$15.9 million bond issue for the Falcon School District." The superintendent also sent a memorandum to Falcon Elementary School that advocated the passage of the bond issue. The memorandum was published, in its entirety, in the school newsletter.

The district also published an article in its newsletter detailing the efforts of the Commitment for Kids Committee and describing the benefits of the bond package.

Holding: The district did not violate the FCPA.

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<sup>14</sup> The Colorado Court of Appeals has rejected the reasoning of this section. See *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140, 1143-1144 (Colo. App. 2004). It has also been rejected in other ALJ decisions. See *Fraternal Order of Police Lodge 19 v. City of Commerce City*, Case No. 1998-42; *Bruce v. Mullen*, Case No. OS 2000-008.

<sup>15</sup> The Colorado Court of Appeals adopted similar reasoning in *Regents of University of Colorado v. Meyer*, 899 P.2d 316, 319 (Colo. App. 1995).

1. A public entity does not expend public moneys urging electors to vote in favor of or against an issue unless an issue committee spends district funds, or the district spends money on behalf of an issue committee.<sup>16</sup>

The ALJ turned to the definition of “expenditure” in the FCPA to determine whether the district expended public moneys to urge voters to vote in favor of the bond issue. The ALJ noted that the definition of expenditure referred to money spent by or on behalf of an issue committee. Therefore, the ALJ held, because there was no evidence that the Commitment for Kids Committee spent any district funds or that the district spent any funds on the committee’s behalf, the district did not violate the FCPA.<sup>16</sup>

2. The district did not make any “contributions” as defined by statute to the Commitment for Kids Committee.

The ALJ held that none of the actions taken by any district employees fell within the definition of “contribution” contained in the FCPA. That definition has since been repealed, and the new definition is significantly broader than the version considered by the ALJ. See Colo. Const. art. 28, § 2. Thus, the specific reasoning of the ALJ is not applicable to cases arising after the 2002 revisions.

### ***Patterson v. Reitinger, Case No. OS 1998-027 (Snider, ALJ)***

#### Background:

In April, 1998, Joanne Reitinger, the Clerk and Recorder of Gunnison County, was seeking reelection. An individual contacted her at her public office about obtaining a campaign sign for her yard. Ms. Reitinger told the individual to return later to pick up a sign, and asked her husband to bring one down to her office. Ms. Reitinger’s husband brought the sign to the county building, and Ms. Reitinger stored the sign there for several hours. The person who made the original request never returned. Another county employee noticed the sign and asked Ms. Reitinger if she could take it home. Ms. Reitinger agreed and gave the sign to the other employee.

Holding: The clerk did not violate the FCPA.

1. Expenditures or contributions of public moneys that are trivial or *de minimis* do not violate the FCPA

The ALJ held that the clerk did not follow the FCPA when she arranged for campaign material to be delivered to a county building and stored her campaign sign on public property. The ALJ explained that the time the county employees spent handling the sign, as well as the use of public facilities to store the sign, had some value, and that value was improperly appropriated to Ms. Reitinger’s campaign. However, the ALJ held that any departure from the strictures of the FCPA was *de minimis*, and did not qualify as a violation.

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<sup>16</sup> The Colorado Court of Appeals has rejected this conclusion. See *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140, 1144 (Colo. App. 2004). Moreover, the definition the ALJ relied upon has been repealed. See Colo. Const. art. XXVII, § 2.

***Bruce v. Office of State Planning and Budgeting, Case No. OS 1998-023 (Jones, ALJ)***

Background:

On September 14, 1998, the Office of State Planning and Budgeting (“OSPB”) published a document titled “Colorado Economic Perspectives.” This document advocated the passage of Referendum B, a state-wide ballot initiative seeking authorization to retain and spend tax revenues under TABOR. It included statements such as, “[t]here are three reasons why the voters should allow the state to retain \$200 million of the surplus per year for the next five years.” The document did not contain any information about why Referendum B should be defeated.

Holding: The OSPB violated the FCPA.

1. Generally, a public entity may not expend public moneys to urge voters to vote in favor of or against a ballot measure.

The ALJ found that the “Colorado Economic Perspectives” document clearly urged electors to vote in favor of Referendum B, a state-wide ballot initiative covered by Section 117. The OSPB argued that its publications should fall under Section 117’s exception for the expression of a personal opinion by an elected official because it is a branch of the governor’s office. *See* Colo. Rev. Stat. § 1-45-117(1)(a)(II). The ALJ disagreed, holding that the “Colorado Economic Perspectives” document was the official position of the Office of the Governor, not the governor’s personal opinion, and therefore was it was not eligible for the “personal opinion” exception. Likewise, the OSPB spent more than fifty dollars on the publication, making it ineligible for the “fifty dollar exception, and did not include any arguments against Referendum B, making it ineligible for the “factual summary” exception. Thus, the OSPB violated Section 117 when it published “Colorado Economic Perspectives.”

***Berry v. Rio Grande Water Conservation District, Case No. OS 1998-016 (Biddle, ALJ)***

Background:

The Rio Grande Water Conservation District (“Rio Grande”), a political subdivision of the State of Colorado, was a member of a non-profit organization known as the Colorado Water Congress (“CWC”). CWC included federal and state agencies, municipal and county governments, and private organizations. CWC historically participated in all phases of the initiative process in Colorado. On March 12, 1998, Rio Grande sent CWC a check for \$10,000 in support of the CWC’s activities opposing certain ballot initiatives. On advice of counsel, CWC returned the funds to Rio Grande on March 17, 1998.

Later, two of CWC’s officers decided to challenge the ballot titles on certain initiatives in their roles as electors, not officers of CWC. The District paid the legal fees the officers incurred in challenging the titles.

Holding: The district did not violate the FCPA.

1. A public entity can correct a contribution that would violate the FCPA by securing an immediate return of the funds.

The Complainants argued that the \$10,000 payment from Rio Grande to CWC violated the FCPA. The ALJ did not address whether the contribution would have violated the FCPA, but instead explained that no FCPA violation occurred because the money was immediately returned.

2. A public entity does not violate Section 117 by paying the legal fees of an elector who challenges a ballot title.

The Complainants conceded that the plain text of Section 117 did not prohibit a public entity from paying the legal fees of an elector who challenges a ballot title, but argued that the practice should be prohibited to uphold the broader intent of the law. The ALJ rejected this argument, holding that when statutory language is clear, it must be applied as written. Therefore a public entity does not violate Section 117 by paying the legal fees of a citizen who challenges a ballot title.

***Fraternal Order of Police Lodge 19 v. City of Commerce City, Case No. OS 1998-042 (Jones, ALJ)***

Background:

Lodge 19 of the Fraternal Order of Police (“FOP”) placed a charter amendment on the city ballot via initiative to implement a new collective bargaining agreement with the police officers. The FOP published an advertisement in a local newspaper supporting the amendment. The city responded by mailing a pamphlet to registered voters urging them to vote against the amendment.

Holding: The city violated the FCPA.

1. A public entity may not expend public moneys publish materials that urge electors to vote for or against a ballot issue.

The parties agreed that Section 117 applied to the charter amendment election. The ALJ explained that a piece of advocacy can violate Section 117 without specifically stating “we urge you to vote for” (or against) a measure. Thus the ALJ held the city’s pamphlet urged voters to reject the charter amendment in violation of Section 117. The city argued that its pamphlet fell under the “factual summary” exception, *See* Colo. Rev. Stat. § 1-45-117(1)(b)(I), but the ALJ rejected this argument because the pamphlet did not contain any arguments against the measure. Therefore, the city’s pamphlet violated the FCPA.

***Kane v. Town of Windsor, Case No. OS 1998-033 (Schulman, ALJ)***

Background:

The Town of Windsor referred an issue to its electors on August 24, 1998. Subsequently, the town published the fall version of its regular newsletter, the *Pelican Brief*. This fall edition contained both a “Question and Answer” portion that explained why the town “would like to see this issue pass” and a note from the mayor directly urging citizens to vote yes on the issue. The *Pelican Brief* was published regularly, and would have cost the same amount to print and ship if the two articles in question had not been included.

Holding: The Town violated the FCPA.

1. A public entity does not expend public moneys by printing and mailing a newsletter that includes an article urging voters to approve or reject a measure if the printing and mailing costs would have been the same if the offending article had not been included.

The ALJ refused to include any of the Town’s costs for printing or mailing the newsletter in its FCPA analysis. It cited *Regents of University of Colorado v. Meyer*, 899 P.2d 316, 319 (Colo. App. 1995), for the proposition that a public entity does not expend money in printing and mailing a newsletter article if the printing and mailing costs for the newsletter would have been the same without the article.

However, the ALJ rejected this argument with respect to the drafting, editing, and desktop publishing costs incurred in creating the articles. These costs, consisting mostly of staff time, would have been avoided completely if the advocacy articles had not been included in the newsletter.

2. While elected officials with policy-making responsibilities may spend up to fifty dollars in public moneys expressing their opinions, no other public entity may expend any public funds urging electors to vote for or against an issue.

The Complainant objected to two sections of the town newsletter, a letter from the mayor and a “Question and Answer” section. Because only the drafting, editing, and desktop-publishing costs and not the printing and mailing costs were considered, the ALJ found that the town spent approximately \$27 publishing the articles. The ALJ held that the mayor of the town was a policy-making elected official, and so he could spend up to fifty dollars in public funds expressing his opinion. Therefore, the letter from the mayor did not violate the FCPA because the portion of the \$27 total cost that was attributable to his letter was less than fifty dollars.

In contrast, the “Question and Answer” article that advocated passage of the issue was not the personal opinion of an elected official, but instead the position of the town itself. Section 117 does not allow a fifty-dollar exception for the expression of official town positions. The article was not eligible for the “resolutions” exception because although the town passed a resolution supporting the ballot issue, the article did much more than merely report the passage of the resolution. Section 117 authorizes public entities to report the passage of a resolution, but not the underlying reasoning for the resolution or further arguments about why electors should adopt the same position. *See* Colo. Rev. Stat. § 1-45-117(1)(b)(III). Thus, the town did not qualify for the “resolutions” exception when it published arguments beyond the text of its resolution that urged electors to vote for the ballot issue. Likewise, the “Question and Answer” article was not eligible for the “factual summary” exception because it did contain any arguments

against the issue. Therefore, the town violated the FCPA when it included the “Question and Answer” article in its newsletter that urged electors to vote for the town’s ballot issue.

***Ferguson v. Morton, Case No. OS 1997-07 (Snider, ALJ)***

Background:

As early as May 1997, the city council of the city of Lakewood considered submitting to Lakewood’s voters a ballot proposal relating to an urban renewal authority. The proposal asked the voters to approve or reject the creation of the authority. The Mayor of Lakewood (“mayor”) routinely wrote a column in the local paper, “Looking at Lakewood,” several times a year, at public expense. In May 1997, the mayor’s column described the benefits of an urban renewal authority. The column contained no negative information. The July and August issues of “Looking at Lakewood” also contained positive articles about urban renewal. The August issue was published prior to August 25, 1997. Prior to August 25, 1997, Mr. Rock discussed the proposal for an urban renewal authority at one or more meetings of citizen’s groups and civic groups. The city prepared a video tape with Mr. Rock and Terry Ware discussing various issues involving the creation of an urban renewal authority. The production was generally informative, but also presented the creation in a positive light. The tape was broadcast on several local access television channels prior to, but not after, August 25, 1997. On August 25, 1997, the city council passed a resolution placing the issue of whether Lakewood should create an urban renewal authority on the November 4, 1997 ballot.

Holding: The city did not violate the FCPA.

1. Section 117 only regulates the conduct of public entities, not individuals.

The complaint was filed only against individuals associated with the City of Lakewood City government. The FCPA only prohibits conduct of public entities, not individual citizens. Thus the individual respondents cannot be held liable for violations of the statute under which the complaint was brought. The ALJ noted that the city can only act through its agents and the complaint could therefore be in essence of a complaint brought against the city of Lakewood. However, the city was never made a party to this complaint and the ALJ refused to name them now as due process laws prohibit an ALJ from entering an order relative to a party who has not received notice nor been given an opportunity to be heard.

In any event, the ALJ found that Lakewood could not have been liable for the actions of its agents until August 25, 1997, when the city council took action to refer the urban renewal ballot issue to the voters. All of the activities involved in this complaint occurred prior to that date. Thus Lakewood’s expenditures made prior to that date did not yet apply to the ballot issue. The ALJ found no violation of the FCPA.

***Garland v. Jefferson County School District R-1, Case No. OS 1998-20 (Connick, ALJ)***

Background:

At a June 4, 1998 meeting, the Board of Education of the Jefferson County School District No. 1 approved a motion that it consider a request for voter approval of a mill levy override question to raise and expend additional local property tax revenue for the district. This motion included authorizing the superintendent to take certain actions relating to an election, such as obtaining legal counsel to insure compliance with legal requirements of an election, prepare recommendations for the school board of programs and needs that would be addressed by a mill levy override, possible uses of the additional funds that the board should consider, a proposed budget, and soliciting community input. June 4 was the first meeting at which the board discussed an election. At an August 13 board meeting, the superintendent presented recommendations to the board regarding a mill levy override, which included a proposed amount of approximately \$34 million. The board considered the recommendations. A public rally supporting a mill levy override election was held on August 31, 1998, with members of the board of education present. The Complainant alleges that public funds were expended at this rally to urge the electors to vote in favor of the mill levy override. On September 3, 1998, the board approved a resolution calling the election and approving a form of election question.

Holding: The school district did not violate the FCPA.

1. Under Section 117, a public entity may not spend public moneys on advocacy material regarding a ballot question after a title has been fixed.

Complainant contends that on June 4, 1998, or at the latest August 13, 1998, the school board submitted the ballot issue regarding a mill levy override to the voters and thus the ballot issue was a referred measure at the time of the August 31 rally. The ALJ found that despite the board's discussion of the election at its June 4 and August 13 meetings, it did not take final action to submit the mill levy override to the voters until September 3, 1998. This decision was based partly on the indefiniteness of the mill levy override amount until the September 3 meeting. The ALJ stated that a referred measure cannot exist until its essential terms are sufficiently definite to permit a determination of what the school board could have referred to the voters. Similarly, the board had requested that the superintendent list programs for consideration. No definitive determination was made by the board until it approved the programs listed in the ballot question on September 3.

***Baer v. Peyton School District No. 23-JT, Case No. OS 1996-018 (Schulman, ALJ)***

Background:

The board of education of Peyton School District No. 23-JT referred a ballot question to its voters by resolution approved on September 17, 1996. The District issued a public notice concerning the election and solicited submission of pro and con statements concerning the initiative. The Complainant submitted comments to the district superintendent. Those comments were published in the Notice of Election required under Article X, Section 20 of the Colorado Constitution (“TABOR”). One week before the general election, the district mailed a newsletter to the residents of the district. It was the first of what was intended to be regular communications between the board of education and residents of the district. This newsletter contained, among other items, an article containing the full text of the ballot question followed by the Board’s reasons for placing the matter on the ballot. The article also contained a brief explanation of the requirements of TABOR, and a description of why the board was asking the voters to retain the excess revenue it receives under TABOR. The article did not contain any “con” statements

Holding: The school district violated the FCPA.

1. A public entity may expend public funds to print an informative newsletter, and that newsletter may contain information about a ballot issue, if that information is fair and balanced.

The ALJ determined that the portion of the newsletter which discussed the ballot issue amounted to approximately \$70.46 plus typing costs. The ALJ stated that merely reprinting verbatim the ballot question and explaining the requirements of TABOR is of an informative nature and does not constitute urging voters to vote one way or the other. However, the District did not stop at that point. It continued to list reasons why the board of education was asking voters to allow the District to retain the revenue. No arguments opposing the ballot issue were included, even though the District had received the Complainant’s TABOR “con” comments prior to its printing the newsletter. Although the District argued that the newsletter did not fall within the proscriptions of the FCPA because it did not include a specific exhortation to voters to vote in favor of the ballot issue, the ALJ was unconvinced. He stated that the “underlying purpose of the Act is to assure that government does not provide an unfair advantage to one side over the other in the electoral process by utilizing public funds to propagandize in support of a particular candidate or issue.” He continued by stating that it is clearly “unnecessary for a specific communication to specifically state ‘we urge you to vote for’ a proposal to fall within the intended proscription of the Act.”

2. The fifty-dollar exception to Section 117 does not apply to acts of the entire board.

The District argued that the FCPA allowed the public entity to expend up to fifty dollars in the form of letters, telephone calls or other activities incidental to expressing an

opinion on a ballot issue. The ALJ determined that the newsletter did not fall within the scope of that exception for two reasons: first, the article represented the official position of the entire board, not the opinion of an individual employee of the District or member of the board. Thus it could not be determined that the expenditure of public funds was incidental to a “member or employee” expressing his or her personal opinion. Further, the amount expended exceeded the \$50 limitation. Additionally, contrary to the suggestion of the board, the statute does not permit the expenditure of \$50 per board member in relation to the newsletter. The ALJ stated that the \$50 exception is intended to permit individuals to expend relatively small sums of public funds to express their opinion on matters covered by the Act. It is not intended to permit public entities to subject to the Act to “subvert the purposes of the Act by pooling the individual exemption to express the agency’s official position with public funds.” Such an interpretation would undermine the very purposes of the Act.

3. Newsletter which contains information not included in a resolution approved by a governmental entity does not constitute the reporting of a resolution for purposes of the Section 117 exception.

The Complainant argued that this exception is not applicable because the District newsletter was not an established, customary means by which the District regularly distributed information to the electors of the District. The ALJ disagreed. The judge held that although this was the first newsletter published by the District, the newsletter was a conceived plan that was put into action prior to the board’s decision to call the election. There was no evidence that the newsletter was published solely as a subterfuge for providing information about the ballot issue or that the newsletter would not continue in the future. Thus the ALJ found that the newsletter was an “established, customary means” of communicating general information to the public.

However, the newsletter did not fall within the reporting and distribution exception that is found within the Act. The FCPA then stated that the governing body may report the approval of a resolution and distribute in a usual and customary way. The newsletter in this case went beyond mere reporting and contained information not found within the resolution, including assertions that the District had a “critical need” for the excess revenues. issue.

### ***Dearborn v. City of Grand Junction, Case No. 1996-07 (Connick, ALJ)***

#### Background:

The Complainant alleged that the City of Grand Junction improperly used public funds to influence an annexation ballot issue by mailing two brochures and a worksheet which urged voters to vote for the annexation.

Holding: The City did not violate the FCPA.

1. Section 117 of the FCPA does not apply to annexation elections.

The ALJ stated that in order for the annexation election to fall within the proscriptions of the FCPA, it must be either (1) a statewide 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; (2) a 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; (3) a referred measure, as defined in Section 1-1-104(34.5); or (4) a 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.

The ALJ found that the annexation issue was clearly not a statewide ballot issue or a recall measure. Further it was not a local ballot issue that had been submitted for the purpose of having a title designated and fixed pursuant to Section 31-11-111. The process of annexation is governed by the Municipal Annexation Act of 1965, Sections 31-12-101 to 123; under that act, annexation procedures do not include a title setting pursuant to Section 31-11-111. Thus an annexation election is not a local ballot issue for the purposes of the FCPA. In order to be a referred measure as defined in Section 1-1-104(34.5), the city council would have had to submit the question to the eligible electors of the city. Here, the eligible electors were landowners in the area proposed to be annexed and not the entire city. Additionally, the city council's actions were not pursuant to either Article 40 or Article 41 of Title 1, as required by the definition of a referred measure. The ALJ thus held that the annexation question was not a referred measure. Because the annexation election was not within the scope of elections covered by the FCPA, the ALJ found that the city was not prohibited from expending public funds to advocate the annexation.

### ***Coan v. Weld County School District Re-3J, Case No. OS 1996-006 (Connick, ALJ)***

#### Background:

The board of education of Weld County School District Re-3J certified a bond issue ballot question on September 9, 1996, to be submitted to the voters that November. Prior to the certification of the ballot issue, the school board retained an investment banking firm and an architectural firm to perform services preliminary to the election. The investment banking firm assisted with campaign election services, including development of a campaign plan, researching voter attitudes, researching voter identification, and developing a communication strategy. The investment banking firm was to be compensated in the form of an "underwriter's fee" if the election passed and bonds were actually issued. That fee was not dependent upon work performed on a bond election campaign. The architectural firm was hired by the board to determine the costs of a capital construction project in order to determine the amount to ask voters to approve at an election. The architect prepared a building and site analysis of existing district facilities for the board's use in determining the District's specific needs. On June 12, 1996, the District mailed to all residents a fact sheet entitled "DID YOU KNOW" which outlined the different renovation and expansion needs of the District, a statement relating to the District's previous bond issues, and current space and design needs. The fact sheet also contained a detailed a five year planning effort to identify school district needs and examine growth. A second fact sheet mailed on June 26, 1996, detailed overcrowding, inadequate space, use of temporary buildings, and outlined the costs of constructing new facilities and renovating existing

facilities. The second fact sheet also described the District's intent to ask voters for funds to complete these improvements. Both fact sheets indicated that the board intended to submit a question of issuing bonds to the voters at an election in November 1996. The fact sheets did not contain arguments against the bond issue.

Holding: The school district did not violate the FCPA.

1. Uncompensated services of investment banking firm do not constitute contributions or contributions in kind of the public entity.

In order to determine that the board had violated the FCPA, it is necessary to prove that it expended public moneys to urge electors to vote for the ballot issue. The ALJ noted that it was clear that the activities of the investment banking firm were undertaken to urge the electors to vote for the bond issue. However, the ALJ examined the definition of "expenditure" and held that it clearly did not encompass uncompensated services. The ALJ examined contract between the investment banking firm and the school district, and determined that the district was not obligated to retain the investment banking firm if the bond issue passed, nor would the underwriting fee charged by the investment banking firm be any more or less depending on whether they had assisted with the election. Further, the ALJ noted that this type of service provided by the investment banking firm was "customary industry practice." The ALJ found no expenditure of public moneys.

It was further alleged that the district expended public fund by retaining the architectural firm to render services related to the bond issue. The ALJ stated that "the mere fact of expending public funds to retain an architect does not violate the FCPA and is further a reasonable action, based on a need to analyze current district facilities, design a plan to remediate deficiencies, and project the cost of such plan." The fact that the architect presented information to organizations, both supporting and opposing the ballot issue, did not violate the FCPA. The architect simply explained work he had performed and answered questions related to that work.

2. The printing an mailing of the fact sheets were not covered as the ballot question had not yet been certified as required by the FCPA.

The complainant argued that the fact sheets, mailed at the board expense, urged electors to vote in favor of the bond issue, did not constitute a factual summary with arguments both for and against the bond issue, and contained conclusions or opinions in favor of the bond issue, all in violation of the FCPA. The board argued that the matter was not "before the electorate" as the ballot issue had not become a referred measure until the board took official action by approving the resolution calling the election on September 7, 1996. The ALJ stated that "no measure can reasonably be considered to have been referred when the governing body has not yet taken action to refer it." Here, while the board clearly intended to refer the bond issue to the voters for some time prior to the fact sheets being mailed, it did not take official action until September 7, 1996. Thus the ALJ found that the FCPA did not prohibit the expenditure of public fund for the distribution of the fact sheets.

***Tancredo v. Las Animas RE-1 School District, Case No. OS 1996-001 (Snider, ALJ)***

Background:

The board of education of the Las Animas Re-1 School District determined to call an election in November 1995 for authorization to issue general obligation bonds for school improvements. A citizens committee (the “committee”) was formed to promote the passage of the bond issue. In September 1995, the superintendent of the district directed an employee to type a one page letter inviting recipients of the letter to attend an organizational meeting for the committee. The letter was sent to 10-15 members of the community. The letters were on district stationery, typed during district working hours, and mailed at the expense of the district. The total cost to the district was less than \$50. The organizational meeting was held at the school library, and the superintendent was in attendance. The committee used rooms at the high school approximately five more times during the course of the election, all without charge. In October 1995, the committee prepared brochures supporting the ballot issue. Those brochures were distributed at a PTA meeting, which was held in a district facility, and were inserted into a football program, which was prepared by the district, at a local football game. There was no evidence that the district or the board were aware that the brochures were being placed in the football programs. Additional activities of the committee which did not involve the district are not summarized in this memo.

Holding: The school district did not violate the FCPA by allowing the committee to meet on its property, or with regard to the placement of the brochure in the football programs; however, the district did violate the FCPA by using district personnel and supplies to invite citizens to an organizational meeting.

1. Use of space in district buildings does not constitute a contribution in kind to a political committee when that space is given as a public resource to any who would request its use.

Meeting Rooms. Applying the statutory definition of “contribution in kind,” the ALJ stated that providing a meeting room without charge did constitute a gift of an item to a political committee. However, the definition further required that the gift be for “the purpose of influencing the passage or defeat of an issue.” The ALJ concluded that the room was not used for those purposes. The district allowed its buildings to be used as a public resource, available to any non-profit group, regardless of the purpose of the event. It was normal for the district to provide space to community organizations without charge. The fact that the meeting may ultimately have led to the passage of the bond issue was incidental.

Football Program. Evidence presented to the ALJ failed to establish that the district or the board of education was aware of the brochure insert into the football program. The ALJ held that even though that pro-bond literature was distributed at a district event, it was not established that the district made this contribution.

2. The fifty-dollar exception does not apply to expenditures incidental to organizing a campaign committee

An employee of the district typed letters inviting citizens to join the committee. Stationary, postage and secretarial time involved in creating and mailing the letter were contributed at the district's expense. The ALJ concluded that this was a contribution in kind by the district in violation of the FCPA because they were made for the purpose of influencing the passage of the bond issue. The district argued the superintendent was entitled to send this letter under the exemption that a policy-maker may expend not more than \$50 to express his or her opinion on a ballot issue. Although less than \$50 was spend on this mailing, there was no evidence that the superintendent expressed a personal opinion in that letter. It was mailed specifically for the purpose of organizing a group to support the passage of the bond issue. Because the expenditures were for the organization of a committee not incident to the superintendent expressing his personal opinion, the district could not avail itself of this exception.

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