

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 633 17 <sup>th</sup> Street, Suite 1300 Denver, Colorado 80202	<b>Received by</b> SEP 30 2010 Secretary of State ▲ COURT USE ONLY ▲
<b>BEFORE THE SECRETARY OF STATE, STATE OF COLORADO,</b>  <b>IN THE MATTER OF THE COMPLAINT FILED BY WILLIAM J. RUSSELL ALLEDGING POLITICAL AND CAMPAIGN FINANCE VIOLATIONS BY JAMES ALDERDEN, SHERIFF LARIMER COUNTY, COLORADO</b>	<b>CASE NUMBER:</b>  <b>OS 20100019</b>
<b>AGENCY DECISION</b>	

This matter is a complaint pursuant to Colo. Const. art. XXVIII, sec. 9(2)(a) and the Fair Campaign Practices Act ("FCPA"), Section 1-45-101, C.R.S. *et seq.* assigned by the Secretary of State to the undersigned Administrative Law Judge ("ALJ") Office of Administrative Courts ("OAC") for an agency decision under Colo. Const. Art. XXVIII, sec. 9(2)(a).

Hearing was held on September 10, 2010 in Courtroom 1 at the OAC in Denver, CO. The hearing was digitally recorded.

Complainant, William J. Russell, was represented by Mark D. Hanson, Esq. Respondent, Sheriff James Alderden, was represented by David P. Ayraud, Esq., Senior Assistant County Attorney, Larimer County. At hearing, Complainant's Exhibits 1 through 9 and Respondent's Exhibits A through B were admitted into evidence. The ALJ also accepted into the evidence the stipulation of facts entered into by the parties and identified as Exhibit 1. The record was held open until September 24, 2010 for the parties to submit post-hearing position statements or briefs for consideration by the ALJ.

All rules of the Secretary of State are found at 8 CCR 1505-6 and will be cited by rule number only. The applicable sections of the Colorado Constitution will be cited by article and section. The applicable section of the FCPA will be cited by section. Section numbers followed by "C.R.S." refer to the Colorado Revised Statutes in their current form unless otherwise stated.

## **ISSUE PRESENTED**

Whether Respondent violated the provisions of Section 1-45-117, C.R.S. of the FCPA by using his business e-mail at the Larimer County Sheriff's office to send e-mails directed at arranging a panel discussion or forum between the current candidates for the office of Sheriff of Larimer County, Colorado. Complainant contends that Respondent used tax-payer funded resources to send e-mails in order to organize a public debate designed to promote a candidate for the office of Sheriff of Larimer County, Colorado.

## **FINDINGS OF FACT**

Based upon the stipulations of the parties and the evidence presented at hearing, the ALJ finds as fact:

1. Complainant filed his complaint with the Secretary of State on September 1, 2010. In his Complaint, Complainant alleges that Respondent violated Section 1-45-117, C.R.S. of the FCPA. The Complaint is based upon the contention that Respondent used tax-payer funded computer equipment during working hours to promote a candidate for elective office.

2. Respondent is the current Sheriff of Larimer County, Colorado and is a registered Republican. Complainant is a registered Democrat and is Chairman of the Larimer County Democratic Party.

3. Justin Smith is the Republican nominee and Jay Harrison is the Democratic nominee for the office of Sheriff of Larimer County in the upcoming election. An independent candidate, Dell Bean, is also running for the office of Sheriff of Larimer County. Respondent has endorsed Justin Smith for the office of Sheriff and nominated Mr. Smith for the office at the Larimer County Republican Assembly held on April 10, 2010. Both Candidate Smith and Candidate Harrison are currently officers in the Larimer County Sheriff's Department. Respondent is not a candidate for re-election because he is term-limited.

4. On August 20, 2010 at 9:27 A.M. Respondent sent an e-mail correspondence from his county e-mail address using county computer equipment addressed to all three of the current candidates for the office of Sheriff, Larimer County. Respondent stated that there had understandably been a lot of angst within the Larimer County Sheriff's Office ("LCSO") and a lot of rumors flying. The e-mail further stated: "It has been suggested the we hold a debate or question/answer forum with the three candidates where the employees can submit their questions anonymously." The e-mail solicited responses from each candidate on their interest in participating and their availability.

5. On August 24, 2010 at 9:11 AM Respondent sent an e-mail from his county e-mail address to Candidate Harrison to respond to an inquiry about the proposed debate from Candidate Harrison. This e-mail was sent to Candidate Harrison with copies to the other candidates, Bean and Smith. This e-mail stated that

Respondent proposed that he would moderate the debate and outlined a proposed format for the debate. The proposed format was for each candidate to make an opening statement, for the moderator to then solicit questions from the audience or ask questions that had been submitted in advance, for each candidate to have the opportunity to ask questions of the other candidates and then for each candidate to make a closing statement. In response to a specific inquiry from Candidate Harrison, Respondent indicated that the debate would be primarily for the benefit of LCSO employees but that he did not think the public could be excluded from attending. In this e-mail Respondent "gave his word" to Candidate Harrison that he would not share the questions submitted in advance with Candidate Smith "or anyone else".

6. On August 26, 2010 at 8:56 AM Respondent sent an e-mail from his county e-mail address to Candidates Bean and Smith and which was copied to Candidate Harrison. Respondent noted in this e-mail that Candidate Harrison had declined to participate if Respondent was going to act as moderator. The e-mail further stated: "We'll open it to the public but would really like the emphasis to be on the department employees who are being bombarded with rumors."

7. On August 31, 2010 at 9:54 AM Respondent sent an e-mail from his county e-mail address to all three candidates. The e-mail was also copied to members of the local media in response to articles in the local print media regarding the proposed debate and Candidate Harrison's refusal to participate because Respondent intended to moderate the debate and had publicly endorsed one of the candidates. In this e-mail Respondent stated: "It would be a disservice to the members of the department if they couldn't get all the candidates to respond to their questions and concerns." The e-mail further stated that Respondent had arranged for the Sheriff of Boulder County to moderate the debate.

8. At hearing, Complainant testified and admitted that the forum/debate proposed by Respondent was open to all candidates for the office of Sheriff, including the independent candidate. Complainant further testified that he thought Respondent would not act as a "neutral" moderator and that Respondent intended to edit the questions given to the candidates. The ALJ finds this testimony unpersuasive.

9. Respondent credibly testified at hearing, and it is found, that he sent the e-mails from his county e-mail address with the intent of having the candidates address the concerns or issues raised by LCSO employees and without any intent to promote a particular candidate.

10. Respondent has the desire to see the LCSO continue its progress and was concerned with the morale of employees of the LCSO. Among the rumors within the LCSO were rumors of a "hit list" of employees, previously terminated employees being brought back to work at the LCSO and rumors of layoffs. Respondent credibly testified, and it is found, that none of these rumors were specifically identified to any one of the candidates for the office of Sheriff. Respondent has tried to "calm the waters" within the LCSO regarding inquiries about changes that may occur with a new Sheriff's administration.

11. The ALJ finds that Respondent's acts of sending e-mails to the candidates for the office of Larimer County Sheriff from his county e-mail address were done for the purpose of arranging a debate to address concerns of LCSO employees and not for the purpose of promoting any candidates nomination, retention, recall, or election.

12. Complainant has failed to prove by a preponderance of the persuasive evidence that Respondent in his official capacity as Larimer County Sheriff used county resources to make a contribution involving the nomination, retention, or election of any person to any public office. Complainant has failed to establish by a preponderance of the persuasive evidence that Respondent violated the provisions of Section 1-45-117, C.R.S. of the FCPA.

### **CONCLUSIONS OF LAW**

1. The ALJ's jurisdiction to hear and determine this matter arises from the provisions of art. XXVIII, sec. 9(2)(a) of the state constitution and Section 1-45-111.5, C.R.S. of the FCPA.

2. Under the provisions of art. XXVIII, sec. 9(2)(f) of the state constitution any hearing conducted by an ALJ pursuant to subsection 2 of Section 9 of art. XXVIII shall be conducted in accordance with the provisions of Section 24-4-105, C.R.S. Under Section 24-4-105, C.R.S. the proponent of an order bears the burden of proof by a preponderance of the evidence. Complainant is the proponent of an order seeking to establish a violation of the FCPA and imposition of sanctions against Respondent for such alleged violation. Complainant therefore bears the burden of proof.

3. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. Section 1-45-117(1)(a)(I), C.R.S. of the FCPA provides:

"No agency, department, board, division, bureau, commission, council of the state or any political subdivision of the state shall make any contribution in campaigns involving the nomination, retention, or election of any person to any public office,"

5. Under Section 1-45-103(6)(a), C.R.S. of the FCPA "contribution" shall have the same meaning as set for in section 2 (5) of article XXVIII of the state constitution.

6. Under Section 2 (5)(IV) of art. XXVIII of the state constitution "contribution" means: "Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election."

7. The purpose of Section 1-45-117, C.R.S. is to prohibit the state government and its officials from spending public funds to influence the outcome of campaigns for political office or ballot issues. *Colorado Common Cause v. Coffman*, 85 P.3d 551, (Colo. App. 2003). Complainant argues that there is no scienter element in Section 1-45-117, C.R.S. and that using tax-payer assets is forbidden regardless of the intent of the elected official. The ALJ is not persuaded.

8. The determination of what constitutes a "contribution" as defined in the FCPA and Section 2 (5)(IV) of art. XXVIII of the state constitution is a factual determination for the ALJ. *Colorado Ethics Watch v. City and County of Broomfield*, 203 P. 3d 623, 625 (Colo. App. 2009). In *Colorado Ethics Watch*, the Court held that the phrase "for the purpose of" in Section 2 (5)(IV) of art. XXVIII has as its plain meaning an indication that an anticipated result is intended or desired. The Court specifically rejected the argument by *Colorado Ethics Watch (CEW)* that the phrase should be construed to mean "with the effect of". The Court further rejected the argument by CEW that the holding in *Coffman*, supra supported the interpretation that the phrase "for the purpose of" should be interpreted as "with the effect of". The Court held that inquiry into purpose requires examination of the intent of the person alleged to have made a contribution. *Colorado Ethics Watch*, id. at 625. The Court further noted that the concepts of knowledge and intent are legally distinct. *Colorado Ethics Watch*, id. at 626. Therefore, Complainant's argument that using tax-payer assets is forbidden regardless of the intent of the elected official is not supported by applicable law.

9. As found, Respondent's intent in using his county e-mail address to send correspondence to the three candidates for the office of Larimer County Sheriff to propose a debate or forum was to address concerns by employees within the LCSO and not to promote the candidacy of Candidate Smith or any other candidate for the office of Sheriff. Respondent's use of his county e-mail address was not for the purpose of promoting a candidate for election and, therefore, Respondent's use of his county e-mail address was not a "contribution" as defined in the FCPA and art. XXVIII of the state constitution. Accordingly, Respondent's use of his county e-mail address to send communication to the candidates proposing a debate was not a violation of Section 1-45-117(1)(a)(I), C.R.S. of the FCPA.

10. Complainant's testimony that he felt Respondent would not be an impartial moderator and intended to edit the questions to favor Candidate Smith is unpersuasive because it is largely simply the subjective assessment of Complainant and is not supported by the persuasive evidence. Each of the e-mails sent out by Respondent evidenced an intention to arrange a balanced presentation by each candidate, to provide each candidate the opportunity to be present for the debate and for the debate to occur in a neutral fashion. Once questions were raised about Respondent acting as moderator, Respondent proposed that the debate continue with another person acting as moderator to address concerns raised by Candidate Harrison because Respondent

had publicly endorsed Candidate Smith. Complainant argues that Respondent by proposing to act as moderator put himself in a position to orchestrate the event and influence the election for his successor in office. While it may be true that the proposed debate with Respondent as moderator may have had the effect of promoting one candidate or the other, that was not Respondent's intent. The fact that Respondent later agreed to step down as moderator in response to concerns raised by Candidate Harrison supports the finding that Respondent's intent was not to attempt to influence the election or favor one candidate over the other. If this were so, Respondent's likely response to Candidate Harrison's concern over Respondent acting as moderator would have been to simply cancel the proposed debate rather than proposing that the debate continue with a different moderator. The ALJ draws this inference since the effect of proceeding with the debate with a different moderator would be that Respondent's ability to influence the debate in favor of one candidate or the other would no longer exist. As held by the Court in *Colorado Ethics Watch*, it is the intent, not the effect, which is dispositive.

11. As found, Complainant has failed to prove by a preponderance of the evidence that Respondent violated the provisions of Section 1-45-117, C.R.S. of the FCPA. In light of this finding and determination, the ALJ declines to address Respondent's argument that as a Sheriff, an independent office created by the Colorado Constitution, he is not a political subdivision of the state and that Section 1-45-117, C.R.S. is not applicable to him.

#### AGENCY DECISION

It is therefore the Agency Decision of the Administrative Law Judge that:

1. Complainant's Complaint against Respondent for a violation of Section 1-45-117, C.R.S. of the FCPA is denied and dismissed, with prejudice.

This Agency Decision is final and will be subject to review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S.

DONE AND SIGNED this 27<sup>th</sup> day of September, 2010.

  
Ted A. Krumreich  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

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


Mark D. Hanson, Esq.  
Attorney for Complainant  
419 West Oak Street  
Fort Collins, CO 80521

David P. Ayraud, Esq.  
Senior Assistant County Attorney  
Larimer County Attorney's Office  
224 Canyon Ave., Suite 200  
Fort Collins, CO 80522

And to:

William A. Hobbs  
Deputy Secretary of State  
Department of State  
1700 Broadway, Suite 270  
Denver, CO 80290

on this on this 29 day of September, 2010.

  
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Court Clerk