

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202	
IN THE MATTER OF THE COMPLAINT FILED BY THOMAS GRAHAM REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY ARVADA CITY COUNCIL MEMBERS BOB FRIE, MAYOR; BOB DYER, MAYOR PRO TEM; DON ALLARD; SHELLY COOK; MARK MCGOFF; MARC WILLIAMS; and RACHEL ZENZINGER.	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>CASE NUMBER: OS 2010-0043</p>
FINAL AGENCY DECISION	

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon complaint by Thomas Graham that Respondents violated Colorado’s campaign practice law by using public money to urge voters to vote against three statewide anti-tax ballot issues.

The Secretary of State received Graham’s complaint October 27, 2010. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaint to the Office of Administrative Courts (OAC) for hearing. Hearing was held November 12, 2010 at the Office of Administrative Courts in Denver, Colorado. Respondents were represented by Roberto Ramirez, Senior Assistant City Attorney. Mr. Graham represented himself.

Case Summary

Graham alleges that the Arvada City Council improperly attempted to influence a statewide ballot issue election by disseminating information opposing three anti-tax proposals known as Amendment 60, Amendment 61, and Proposition 101 (the “ballot issues”). Specifically, the City Council adopted a resolution strongly opposing the ballot issues, and then published the resolution and an addendum referenced in the resolution in The Arvada Report, an informational circular published by the City Council at public expense. The resolution’s “WHEREAS” clauses and the addendum contained one-sided arguments opposing the ballot issues. Graham contends this publication violates § 1-45-117(1)(a)(I)(A) of the Fair Campaign Practices Act, which prohibits government entities from expending or contributing public monies to urge voters to vote for or against any statewide ballot issue, except under very limited circumstances.

Respondents do not deny that the resolution and its addendum were published in The Arvada Report, or that the resolution's WHEREAS clauses and addendum presented only one-sided arguments opposing passage of the three ballot issues. Rather, Respondents contend that their conduct was proper under the exception that permits a city council to pass and report its resolutions, including resolutions that take positions of advocacy on ballot issues.

For reasons explained below, the ALJ concludes that the evidence is not sufficient to prove a violation of the campaign practice law.

Findings of Fact

1. The City of Arvada is a political subdivision of the state of Colorado. It is governed by a City Council of seven members: Bob Frie, Mayor; Bob Dyer, Mayor Pro Tem; Don Allard; Shelly Cook; Mark McGoff; Marc Williams; and Rachel Zenzinger, Council Members.

2. Amendment 60, Amendment 61, and Proposition 101 (the "ballot issues") were three statewide anti-tax proposals that were on the ballot for the November 2, 2010 general election.¹

3. At a City Council meeting on September 1, 2010, the Council considered and adopted Resolution No. R 10-087 opposing the ballot issues. The resolution clauses read:

NOW, THEREFORE, BE IT RESOLVED that the Arvada City Council strongly opposes the passage of Amendment 60, Amendment 61, and Proposition 101; and

BE IT FURTHER RESOLVED that the Arvada City Council joins municipalities, special districts, concerned businesses, chambers of commerce, economic development organizations, faith-based groups, public entities, and citizens in opposition to the passage of these ballot measures in order to preserve the economic stability of the State of Colorado, its counties, cities, school districts, and others who serve to build growth and provide essential services to the people of Colorado.

4. The resolution clauses were preceded by seven WHEREAS clauses that provided the rationale for the resolution. The last two clauses are particularly relevant to the issue presented in this complaint:

WHEREAS, the passage of Amendment 60 and Amendment 61 (initiated amendments to the Colorado Constitution) and Proposition 101 (an initiated amendment to the Colorado Revised Statutes) would necessitate further and more severe reductions in services and amenities, would undercut local control, and result in substantial job losses both within government and the private sector; and

¹ There is no dispute that Amendment 60, Amendment 61, and Proposition 101 were statewide ballot issues whose titles had been designated and fixed pursuant to § 1-40-106(1), C.R.S.

WHEREAS, more specific details about the impacts of these ballot issues may be found in an addendum to this resolution.

5. The addendum to the resolution, referenced in the last WHEREAS clause, was titled "Addendum to the Arvada City Council Resolution in Opposition to Amendment 60, Amendment 61, and Proposition 101," and contained a lengthy set of arguments against the passage of the ballot issues, including that Arvada residents would see "immediate, obvious, and permanent reductions in service" should the ballot issues pass, including service reductions in public and personal safety, transportation, economic foundation, education, parks and recreation, maintaining an attractive community, and quality of life.

6. The information in the addendum was compiled by the Assistant City Manager, Ms. VanderKolk, from sources she considered reliable and presented to the City Council for consideration. The City Council considered the information, adopted it as part of their rationale for the resolution, and directed that it be included as an addendum to the resolution.

7. Nothing in the resolution or the addendum specifically asked voters to vote against the ballot issues, but the WHEREAS clauses and the addendum presented only arguments in opposition to, and no argument in support of, the ballot issues.

8. There are other points of view that favor the passage of the ballot issues, but they were not included within either the WHEREAS clauses or the addendum.

9. All six members of the City Council who were present at the meeting considered the addendum and voted in favor of the resolution. The Mayor, Bob Frie, was not present at the meeting and did not vote.

10. The City Council adopted the resolution, with the addendum, because the City Council was concerned that Arvada's voters understand the impact the ballot issues would have upon services provided by the City if the ballot issues were adopted. In so doing, the City Council followed the lead of several other cities in the Denver metro area.

11. The City Council reported the resolution and the addendum in their entirety in the October/November 2010 issue of The Arvada Report, a "News and Information" circular published and distributed at public expense by the City Council once every two months. This issue of The Arvada Report was mailed to City residents some time prior to the November 2, 2010 general election.

12. The Arvada Report is an established and customary means for the City Council to distribute information about proceedings of the City Council, as well as other information of interest to Arvada residents. It is the City Council's primary method of communicating with City residents. Resolutions adopted by the City Council are routinely included in The Arvada Report.

13. The Arvada Report contains no paid advertising, and no City Council member expended any personal funds to print and publish The Arvada Report. The entire expense of the publication was paid from the City's general fund.

14. The City annually budgets approximately \$130,000 for the cost of printing and mailing The Arvada Report six times per year to over 54,000 residential and business addresses within the City. The budget also includes a line item for The Arvada Report's graphic design. The average cost per issue is approximately \$11,000 for printing and \$8,000 for postage.

15. The actual cost incurred to produce and mail the October/November 2010 issue of The Arvada Report was not established by the evidence.

16. In addition to the printing and mailing costs, some amount of expense is incurred for staff time necessary to prepare and manage the publication of The Arvada Report. The annual budget of \$130,000 does not include staff salaries.

17. Two staff members typically contribute some amount of time to the production of The Arvada Report that is not included in the annual budget. The Assistant City Manager, Ms. VanderKolk, devotes approximately twenty percent of her time to writing, editing, and managing The Arvada Report. Another staff member devotes a minimal amount of time to taking photographs for the publication. The evidence did not disclose the salaries of these staff members, or the amount of time the staff members devoted to the October/November 2010 issue.

18. The resolution with the WHEREAS clauses appeared on the first page of The Arvada Report and occupied the majority of that page. The addendum was printed on page 3 of The Arvada Report and occupied the entirety of that page.

19. The October/November 2010 issue of The Arvada Report was 24 pages in length. The publication is typically 24 pages long, but at times may be 32 pages. Because The Arvada Report can only be printed in eight page increments, the length of the October/November 2010 issue was not affected by inclusion of the resolution and the addendum. That is to say, because the publication cannot be 22 pages, it still would have been 24 pages long even if the resolution and its addendum had not been included. Had the resolution and addendum not been included, other information would likely have been included in its place to occupy the full 24 pages.

20. The Arvada Report is commercially printed, and delivered by the U.S. Post Office. Because the October/November 2010 issue would have been 24 pages long regardless of whether the resolution and addendum were included or not, inclusion of the resolution and addendum did not cause the City to incur any additional printing or mailing costs.

21. Some undisclosed amount of staff time was required to format the resolution and addendum for inclusion in The Arvada Report. Although the amount of staff time devoted to this task was undisclosed, it was likely to be minimal because the resolution and addendum were included in The Arvada Report essentially verbatim, without additional drafting or editing by the staff. The only edit was a single introductory sentence added by Ms. VanderKolk, which read: "On September 13, 2010, the Arvada City Council passed the following resolution."

Discussion and Conclusions of Law

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

The section of the FCPA at issue in this case is § 1-45-117(1)(a)(I)(A), which reads in pertinent part:

No agency, department, board, division, bureau commission, or council of the state or any political subdivision of the state shall . . . expend any moneys from any source, or make any contributions, to urge electors to vote in favor of or against any . . . Statewide ballot issue.

The purpose this general rule is to promote confidence in government by prohibiting the use of money authorized for public purposes to advance the personal viewpoint of one group over another. *Denver Area Labor Federation v. Buckley*, 924 P.2d 524, 528 (Colo. 1996). The essence of the prohibition is not to stifle expression of opinion about ballot issues, but to prevent public entities from using public resources to persuade voters how to vote on those issues. *Coffman v. Colorado Common Cause*, 102 P.3d 999, 1006 (Colo. 2004) (“the expressed purpose of the [FCPA] was to prevent state or political subdivisions from devoting public resources toward persuading voters during an election.”)

Violations subject the public entity to the sanctions identified in Colo. Const. art. XXVIII, §§ 9(2) and 10(1), or any other “appropriate order or relief.” Section 1-45-117(4), C.R.S. In addition, any person who makes an expenditure in violation of § 1-45-117(1) may be subject to “an order to reimburse the fund of the state or political subdivision, as applicable, from which such moneys were diverted for the amount of the contribution or expenditure, injunctive relief, or a restraining order to enjoin the continuance of the violation.” *Id.* Because a “person” includes natural persons (*see* § 1-45-103(13), C.R.S. and Colo. Const. art. XXVIII, § 2(11)), this provision applies to the individual council members who authorize the offending public expense.

The Elements of an FCPA Violation

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

- 1) The City of Arvada is a political subdivision of the state;
- 2) That expended or contributed monies from any source;
- 3) To urge electors to vote for or against one or more statewide ballot issues;
- 4) That had titles designated and fixed, or had been submitted for that purpose, pursuant to § 1-40-106(1), C.R.S.

If those elements are met, then the ALJ must consider whether one or more exceptions apply. Two exceptions are relevant to this case. The first is found at §§ 1-45-117(1)(b)(III)(A) and (B), C.R.S. and will be referred to as the “resolution exception.” The other is found at § 1-45-117(1)(a)(II) and will be referred to as the “\$50 exception.”²

The Resolution Exception

Sections 1-45-117(1)(b)(III)(A) and (B) read, in pertinent part:

Nothing in this subsection (1) shall be construed as preventing an agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof from:

(A) Passing a resolution or taking a position of advocacy on any [statewide ballot issue]; or

(B) Reporting the passage of or distributing such resolution through established, customary means, other than paid advertising, by which information about other proceedings of such agency, department, board, division, bureau, or council of the state or any political subdivision thereof is regularly provided to the public.

Under this exception, even if the City Council did expend or contribute public funds to urge voters to defeat the ballot issues, its action would not violate the FCPA if for the purpose of passing a resolution, and reporting and distributing that resolution to the public by customary means.

The \$50 Exception

This exception allows a member or employee “who has policy-making responsibilities” to expend,

. . . not more than fifty dollars of public moneys in the form of letters, telephone calls, or other activities incidental to expressing his or her opinion on any [statewide ballot issue].

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

Under this exception, even if the resolution exception did not apply, the City Council members (who all have policy-making responsibility) could still spend up to \$50 of public funds incidental to expressing their collective opinion that the ballot issues should be defeated.

The City Council Urged Voters to Vote Against the Ballot Issues

There is no dispute that the City of Arvada is a political subdivision of the state, that its City Council adopted a resolution opposing the ballot issues, and that the resolution and addendum contained only arguments against the ballot issues. Although

² The resolution and addendum are not an even-handed “factual summary” that included “arguments for and against” the ballot issues, therefore the exception of § 1-45-117(1)(b)(I) does not apply.

the resolution and addendum did not specifically ask voters to vote against those ballot issues, they included entirely one-sided arguments against the ballot issues, and therefore effectively “urged” voters to reject them. *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140, 1143 (Colo. App. 2004)(“the average individual understands ‘urge’ to mean promote, take a position, favorable or opposed to a particular . . . proposition, or openly and publicly seek . . . the passage or defeat of a proposition submitted to the electorate”)(quoting *Godwin v. East Baton Rouge Parish School Bd.*, 372 So.2d 1060, 1064 (La. Ct. App. 1979)).

The question remains whether public monies were spent to distribute the resolution and addendum in The Arvada Report, and if so, whether one of the exceptions applies.

The Evidence Does Not Prove an Expenditure Exceeding \$50

There is no dispute that the members of the City Council hold policy-making positions, and therefore, pursuant to the “\$50 exception,” the Council members could collectively spend up to \$50 of public money incidental to expressing their personal opinion of the ballot issues. It is also clear that the resolution and addendum represent the personal opinion of the six members voting for the resolution.

Although more than \$50 was spent to print and mail the October/November 2010 issue of The Arvada Report, that amount cannot be attributed to the inclusion of the resolution and addendum because the same amount of money would have been spent to print and mail the publication even if those items had not been included. The same printing and mailing costs for a 24-page publication would have been incurred in any event. See *Regents of the Univ. of Colo. v. Meyer*, 899 P.2d 316 (Colo. App. 1995), where the court applied a similar exception in the predecessor to the current FCPA to hold that a university newsletter containing a paragraph advocating opposition to a ballot issue did not violate the FCPA because “even if the challenged paragraph had been deleted, there would have been no difference in the cost.” *Id* at 319.

Although no extra money was spent to print and distribute the resolution and addendum, the cost of staff time incurred to include those documents in The Arvada Report might nonetheless be considered an unlawful “contribution” prohibited by § 1-45-117(1)(a)(I). See *Coffman, supra* at 1012-13, where the court held that Treasurer Coffman’s directive that Treasury Department employees prepare press releases opposing a statewide ballot issue amounted to an illegal contribution in kind. However, in this case, the record is devoid of any evidence to prove that the fair value of the staff time exceeded \$50. To the contrary, because the resolution and addendum comprised only a small portion of the publication, and were included nearly verbatim with almost no additional drafting or editing, the amount of staff time spent to include this material was likely to be minimal.³ The ALJ therefore concludes that the “\$50 exception” applies and no violation of the FCPA has been proven.

³ The ALJ does not count the unspecified amount of time Ms. VanderKolk originally spent compiling the information in the addendum because that effort was for the purpose of advising the City Council, not for the purpose of urging voters to vote against the ballot issues.

Because the “\$50 exception” is dispositive of the case, the ALJ need not decide whether the “resolution exception” also applies.

Agency Decision

For reasons stated above, the evidence is not sufficient to prove that the Arvada City Council’s actions violated § 1-45-117(1)(a)(I)(A) of the FCPA. This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed

November 23, 2010

ROBERT N. SPENCER
Administrative Law Judge

Hearing digitally recorded in CR #4

Exhibits admitted:

Complainant’s exhibit: A

Respondents’ exhibits: 1, 2

CERTIFICATE OF SERVICE

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

Thomas Graham
6080 Routt Street
Arvada, CO 80004

Roberto Ramirez, Senior Assistant City Attorney
Arvada City Attorney's Office
8101 Ralston Rd.
Arvada, CO 80002

and

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

on this ____ day of November 2010.

Court Clerk