

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2002-006

ORDER GRANTING SUMMARY JUDGMENT AND AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY JASON PAVLOVIC REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART OF THE ST. MARY'S PROPERTY OWNERS ASSOCIATION BOARD OF DIRECTORS, CONSISTING OF C.J. GALBRAITH, GLORIA BOWMAN, KAREN WEDDING, CATHY HARPER, ANTHONY RAMSEY, CORY CAMALLIERI and JULIE FLAHERTY

This matter comes before the Administrative Law Judge (ALJ) on the Motion for Summary Judgment of Respondent St. Mary's Property Owners Association Board of Directors. Complainant Jason Pavlovic originally filed a complaint with the Secretary of State alleging violations of the Fair Campaign Practices Act (FCPA). In response to Respondent's Motion for Separate Statement or for More Definite Statement, Complainant filed a more detailed version of his original complaint. Finally, in response to the ALJ's order, Complainant filed a third more definite statement of his complaint.

Respondent asserts in its motion for summary judgment that there are no disputed facts in this matter and that, even if they concede Complainant's factual assertions for the purposes of resolving this motion, Complainant still cannot prevail. Summary judgment is proper when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. C.R.C.P. 56(c), *Clementi v. Nationwide Mutual Fire Insurance Company*, 16 P.3d 223, 225-6 (Colo. 2001); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999); *Dale v. Guar. Nat'l Ins. Co.*, 948 P.2d 545, 553 (Colo. 1997). *West American Insurance Co. v. Baumgartner*, 812 P.2d 696 (Colo. App. 1990). The non-moving party, here Respondent, is entitled to the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. All doubts as to whether an issue of fact exists must be resolved against the moving party. *Bebo*, supra at 83; *Aspen Wilderness Workshop, Inc., v. Colorado Water Conservation Board*, 901 P.2d 1251 (Colo. 1995); *Sender v. Powell*, 902 P.2d 947 (Colo. App. 1995).

Complainant alleges numerous violations of the FCPA by Respondent in relation to the May 7, 2002, elections for the Board of Directors of both the St.

Mary's Metropolitan District and the St. Mary's Water and Sewer District. The asserted violations are as follows:

1. The Complaint alleges that Respondent made an independent expenditure to produce and distribute a political message in violation of Section 45-1-107(1), C.R.S., which requires persons making independent expenditures to provide certain notice within 24 hours. The expenditure at issue was to publish and distribute the March 2002 *Timberline Newsletter* by mail and to maintain it on Respondent's website. The Complaint asserts that this newsletter promoted the election of some candidates and the defeat of others.
2. The Complaint asserts that the political message above did not contain the disclosures required by Section 45-1-107(2), C.R.S.
3. The Complaint asserts a violation of Section 45-1-107(3), C.R.S., which defines expenditures on behalf of candidates that are coordinated or controlled by the candidate as contributions to the candidate and subjects the candidate and contributor to applicable penalties, but fails to specify the exact nature of the violation.
4. The Complaint charges that POA is a political committee which failed to meet the following obligations established by the FCPA:
 - a. Reporting the *Timberline Newsletter* expenditure described above, as required by Section 1-45-108(1)(a).
 - b. Reporting the *Timberline Newsletter* expenditure described above to the Secretary of State, as required by Section 1-45-108(2.5).
 - c. Registration with the Secretary of State, as required by Section 1-45-108(3).

Complainant seeks in the third version of his Complaint to raise two additional FCPA violations which were not raised originally: 1) a violation of Section 1-45-109(9), C.R.S., which prohibits political committees from expending currency or coin exceeding \$100 and 2) a violation of Section 1-45-108(1)(a), C.R.S., by three candidate committees.¹ These violations were not raised in the

¹ In the third version of his complaint, Complainant appears to assert that the candidate committees of the three sitting members of the Respondent Board of Directors (Cathy J. Harper, Carol Jean Galbraith, and Cory Camallieri) failed to report the receipt of the contribution (*i.e.*, the value of the production, distributing and posting of the *Timberline Newsletter*) in violation of Section 1-45-108(1)(a), C.R.S. This provision requires candidate committees to report contributions received. The original Complaint filed, however, clearly asserted violations only by the POA Board of Directors, not by candidate committees for any of the POA Directors who were candidates for election. In the second version of his Complaint, Respondent again asserts

initial Complaint and cannot be added later. The ALJ therefore does not address these alleged violations.

Based on the facts established by affidavit and otherwise agreed to by Respondent for the purposes of resolving this motion only, the ALJ finds that the following facts are not disputed for the purpose of ruling on this motion for summary judgment.

FINDINGS OF FACT

1. Elections were held on May 7, 2002, for Boards of Directors of the St. Mary's Metropolitan District and the St. Mary's Water and Sewer District. There were several candidates in these races, including Complainant and three directors of Respondent (Cathy J. Harper, Carol Jean Galbraith, and Cory Camallieri).²

2. Respondent produced and distributed to the *Timberline Newsletter* of March, 2002, by mail and maintained the newsletter on its website. This edition included a section entitled "Candidate Profiles for the 2002 Election," which included a photograph and personal statement from most but not all of the candidates for in the election for the two Districts. It did not include such information for Complainant or another candidate.

3. As reflected in POA's Articles of Incorporation, filed November 25, 1970, POA's purpose is the facilitation of communication among residents of the St. Mary's Glacier area and with various developers. POA is a social, educational and cultural organization devoted to providing a forum for those interested in development and beautification of the St. Mary's Glacier area.

DISCUSSION

The ALJ addresses each of the alleged FCPA violations enumerated above:

1. Violation of Section 1-45-107(1), C.R.S. For purposes of this motion, the ALJ assumes that Respondent's production and distribution of the *Timberline*

violations only against Respondent, defined by him as the St. Mary's Property Owner's Association Board of Directors, and each and every member thereof. In paragraph 3 of that Complaint, Complainant asserts that Respondent failed to report this contribution in kind and cites an inapplicable provision, *i.e.*, Section 1-45-102(5), C.R.S. In addition, at no time did Complainant object to the caption provided by the Division of Administrative Hearings in this matter, which clearly names the individuals only in their capacity as POA Directors. In ordering Complainant to provide a more specific statement of his complaint, the ALJ did not authorize him to expand that complaint beyond the original one filed.

² The record does not establish the correct spelling of this name, which was spelled in the caption based on the spelling provided by Complainant but which appears in the *Timberline Newsletter* with a spelling of Cory Cameliari.

Newsletter constitutes an independent expenditure pursuant to Section 1-45-103(7), C.R.S.³ in excess of \$1,000 for a political message.⁴ In such case, Section 1-45-107(1) provides that a person making such an expenditure must provide written notice of certain facts within 24 hours.⁵ The Tenth Circuit Court of Appeals, however, has invalidated this disclosure requirement in its entirety on First Amendment grounds, and Section 1-45-107(1) therefore cannot be enforced. *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174, 1196-1198 (10th Cir. 2000). The Complaint therefore establishes no violation in regard to Section 1-45-107(1).

2. Violation of Section 45-1-107(2), C.R.S. The Complaint asserts that the political message contained in *Timberline Newsletter* and on Respondent's website did not contain the disclosures required by Section 45-1-107(2), C.R.S.⁶ This provision, however, was also invalidated by *Citizens for Responsible Government v. Davidson*, *supra* at 1198-2000. No violation of Section 1-45-107(2) can therefore be established.

3. Violation of Section 45-1-107(3). The Complaint asserts a violation of this provision without specifically stating the nature of the violation. Section 45-1-107(3) reads as follows:

³ Section 1-45-103(7), C.R.S., defines "independent expenditure" as follows: "Independent expenditure" means payment of money by any person for the purpose of advocating the election or defeat of a candidate, which expenditure is not controlled by, or coordinated with, any candidate or any agent of such candidate. "Independent expenditure" includes expenditures for political messages which unambiguously refer to any specific public office or candidate for such office, but does not include expenditures made by persons, other than political parties and political committees, in the regular course and scope of their business and political messages sent solely to their members."

⁴ Section 1-45-103(11), C.R.S., defines "political message" as follows: "'Political message' means a message delivered by telephone, any print or electronic media, or other written material which advocates the election or defeat of any candidate or which unambiguously refers to such candidate."

⁵ Section 1-45-107(1), C.R.S., provides as follows: "Any person making an independent expenditure in excess of one thousand dollars shall deliver notice in writing of such independent expenditure, as well as the amount of such expenditure, and a detailed description of the use of such independent expenditure, within twenty-four hours after obligating funds for such expenditure. Such notice shall be delivered to all candidates in the affected race and to the secretary of state. The notice shall specifically state the name of the candidate whom the independent expenditure is intended to support or oppose. Each independent expenditure shall require the delivery of a new notice."

⁶ Section 1-45-107(2), C.R.S., provides as follows: "Any person making an independent expenditure in excess of one thousand dollars shall disclose in the political message produced by the expenditure, the full name of the person, the name of the registered agent, the amount of the expenditure, and the specific statement that the advertisement or material is not authorized by any candidate. Such disclosure shall be prominently featured in the political message."

(3) Expenditures by any person on behalf of a candidate for public office that are coordinated with or controlled by the candidate or the candidate's agent shall be considered a contribution to the candidate and subject the candidate and the contributor to any applicable penalties contained in this article.

The Complaint does not explain how this provision was allegedly violated. The provision itself does not impose any duty on behalf of persons making expenditures on behalf of candidates. It merely defines certain such expenditures as contributions and subjects the contributor to applicable penalties found elsewhere in the FCPA. In relation to this asserted violation, the Complaint therefore fails to state a claim.

4. Violations by Political Committee. The Complaint also asserts that POA, as a political committee, has failed to meet certain FCPA requirements applicable only to political committees regarding the *Timberline Newsletter* expenditure described above: Section 1-45-108(1)(a) [expenditure reports]; Section 1-45-108(2.5) [reports to Secretary of State]; and Section 1-45-108(3) [registration requirement]. These asserted violations all rely on Complainant's assertion that POA is a political committee. That term is defined in Section 45-1-103(10)(a), C.R.S.:

"Political committee" means two or more persons who are elected, appointed, or chosen, or have associated themselves, **for the purpose of** making contributions to candidate committees, issue committees, political parties, or other political committees, or for the purpose of making independent expenditures. "Political committee" does not include political parties, issue committees, or candidate committees as otherwise defined in this section.

(Emphasis Added).

The Colorado Supreme Court has interpreted the phrase "for the purpose of" in connection with the definition of "issue committee"⁷ to include "only those issue committees that were formed for the purpose of supporting or opposing a ballot initiative." It then specifically determined that organizations formed for another purpose that later engage in ballot issue activity are not included in the definition of "issue committee." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 758 (Colo. 2000). The Tenth Circuit Court of Appeals followed this interpretation of "for the purpose of" in interpreting the identical phrase in the definition of "political committee." It held that a political committee "is formed

⁷ Section 1-45-103(8) (a) (1) defines "issue committee" in part as follows: (l) Two or more persons who are elected, appointed, or chosen, or have associated themselves, for the purpose of accepting contributions and making expenditures to support or oppose any ballot issue or ballot question;

when two or more persons associate themselves with the original purpose of making independent expenditures.” *Citizens for Responsible Government v. Davidson, supra* at 1191.

In this matter, POA is a social, educational and cultural organization devoted to providing a forum for those interested in development and beautification of the St. Mary’s Glacier area. POA’s original purpose was the facilitation of communication among residents of the St. Mary’s Glacier area and with various developers, not to make independent expenditures. POA is therefore not a political committee as defined in Section 1-45-103(10)(a), C.R.S. None of the violations asserted by the Complaint as described in paragraph 4 above can therefore be established.

AGENCY DECISION

It is the Agency Decision that this Complaint is dismissed in its entirety. The hearing scheduled for September 11, 2002, is vacated.

DONE AND SIGNED

September ____, 2003

NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **ORDER GRANTING SUMMARY JUDGMENT AND AGENCY DECISION** was sent U.S. Mail, postage prepaid, in Denver, Colorado to:

Jason Pavlovic
13651 Stuart St.
Broomfield, CO 80020

Thomas J. Young, Jr.
4105 E. Florida Ave., No. 300
Denver, CO 80222

on September ____, 2003.

Secretary to Administrative Law Judge

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