

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2002-007

ORDER GRANTING SUMMARY JUDGMENT AND AGENCY DECISION

IN THE MATTER OF THE COMPLAINT FILED BY SHARON SCHOENING REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON THE PART OF THE INTERCANYON FIRE PROTECTION DISTRICT BOARD OF DIRECTORS, specifically ROBERT CHAMBERLAIN, RICHARD M. BARNES and DIANNA RODER

Respondents have filed a motion to dismiss in this matter asserting that Complainant Sharon Schoening has failed to state a claim for relief under the Fair Campaign Practices Act, Sections 1-45-101 to 118, C.R.S. (2001) ("FCPA"). Complainant filed no response to this motion. This matter arises from a Complaint filed on June 11, 2002, with the Colorado Secretary of State alleging violations of the FCPA. The Secretary of State transmitted the Complaint to the Colorado Division of Administrative Hearings for the purpose of conducting a hearing pursuant to Section 1-45-111(2)(a), C.R.S. (2001), of the FCPA.

Because Respondents have presented factual matters outside the pleadings by attaching affidavits and various election documents, the Administrative Law Judge treats the motion to dismiss as a motion for summary judgment pursuant to C.R.C.P. 56. 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 Complainant, 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).

STATEMENT OF THE ISSUES

The Complaint raises four alleged violations of the FCPA: 1) the District's process for considering candidates for a Board vacancy and its decision not to

select Complainant, 2) the misspelling of Complainant's name on the May, 2002 ballot and Notice of Election, 3) the conduct of the District at a meeting allegedly held to encourage votes for the two incumbents, and 4) the procedure used to count the ballots of the May 7, 2002 election. Respondents assert that these allegations do not state claims for relief under the FCPA.

FINDINGS OF FACT

Based upon the undisputed facts, the Administrative Law Judge finds as follows:

1. Temporary Appointment in November, 2001. Respondent Inter-Canyon Fire Protection District ("District"), a special district, is governed by a five-member, nonpartisan elected Board of Directors ("Board"). By at least October, 2001, it became clear that there would be a vacancy on the Board because its President Dean Holme was moving and would no longer be qualified to serve on the Board.

2. Pursuant to Section 1-12-207, C.R.S., such vacancies are filled by appointment by the remaining directors, and the person appointed serves until the next regular election. Complainant Sharon L. Schoening wished to be appointed by the Board to fill this vacancy. The Board decided to interview the candidates for the vacancy. Complainant was not notified of the first Board meeting at which candidates were interviewed. Because Complainant had not been notified of this meeting and therefore had not been interviewed, the Board delayed its action on the vacancy until November 8, 2001, when Complainant did appear and was interviewed.

3. At its November 8, 2001 meeting, the Board appointed Kimberly Moore to fill this vacant Director position until the scheduled election in May, 2002.

4. Complainant appears to raise several issues regarding the appointment of Ms. Moore: the alleged failure of Richard M. Barnes, CPA, whose firm handles accounting and administration for the District, to carry through on his promise to notify her of the date of the Board interviews of candidates; the procedure by which she was interviewed on a different date than other candidates; and her alleged superior qualifications for the position.

5. Misspelling of Schoening's Name. Complainant was also a candidate at the May 7, 2002 election for a four-year Director position. There were two other candidates for the two available positions, both of whom were incumbents: Allan C. Gordon and Ralph M. Dreher.

6. The correct spelling of Complainant's name is Sharon L. Schoening. On the Notice of Election published in the local newspaper in April, 2002, however, Dianna Roder, the Designated Election Official from the firm of Richard Barnes, CPA PC, made an error and listed Complainant as "Sharon I. Shoening." On the ballots for the May 7, 2002 election, Ms. Roder again

misspelled Complainant's name as "Sharon L. Shoening." Mr. Roder did not realize her mistake until after the election.

7. Complainant raises the issue of her misspelled name on the Notice of Election and on the ballot.

8. May 2, 2002 Meeting. On May 2, 2002, a meeting of the Inter-Canyon Fire Rescue was held. Inter-Canyon Fire Rescue is a member organization comprised of volunteer firefighters with the District but is a separate organization from the District. Inter-Canyon Fire Rescue invited several District Directors to attend as guests. Robert Chamberlain, the Treasurer of the District, accepted the invitation and spoke in his individual capacity at the meeting. Mr. Chamberlain addressed the issue of the mill levy increase, which was also on the ballot at the May 7, 2002 election, and indicated that the membership should get out and vote. Mr. Chamberlain also introduced two other Board Directors in attendance, who were running for re-election as incumbents. The District Fire Chief Bill Lucatuorto, who was in attendance, then indicated at the meeting that Complainant was running in addition to the two incumbents. Director Ralph Dreher, one of the incumbents present, asked the membership to support him. No written material on the election issues or candidates was distributed.

9. Complainant objects to this meeting, which she inaccurately characterizes as a Board meeting, being held without her knowledge and with other candidates being invited. She alleges that this meeting was held by the Board to solicit votes for the other candidates. She characterizes these actions as giving the other candidates an unfair advantage and constituting discriminatory collusion.

10. Lack of Opportunity to Attend Ballot Count. Complainant was not notified of or invited to attend the counting of the ballots cast at the May 7, 2002 election. Rather, Dianna Roder notified her that evening that the ballots had been counted three times and that she did not win.

11. Complainant believes that she is entitled to notice of the location of the count, who supervised the count, and who was in attendance. She characterizes the ballot count as a secret meeting representing discrimination.

DISCUSSION

The Complaint in this matter was filed pursuant to Section 1-45-111(2), C.R.S., which authorizes the filing of complaints with the Secretary of State alleging violations of certain provisions of the FCPA. A review of the violations listed, however, shows that none of the four grievances raised by Complainant can be characterized as a violation of these enumerated provisions of the FCPA.

The FCPA authorizes the filing of only those complaints alleging violations of Sections 1-45-105.3, 105.5, 1-6, 108, 114, 115, and 117, C.R.S. These FCPA provisions address the following issues: limits on the contributions which can be

made in conjunction with elections, limits on contributions which can be made to legislators and the governor while the legislature is in session; limits on how unexpended campaign contributions can be used; required financial disclosures to be made by candidate committees, political committees, issue committees, and political parties; limits on the charges candidates can pay for media advertising; prohibition of withdrawing from a campaign in exchange for the payment of money; and limits on spending by the state and political subdivisions in conjunction with electoral campaigns. The Complainant raises none of these issues.

The FCPA does not even address the issues of how to fill vacancies on a nonpartisan board, the misspelling of a candidate's name on the ballot and the Notice of Election, and the procedures for counting ballots. Rather, these issues are addressed in the Uniform Election Code, and the enforcement mechanism specified does not include the Secretary of State or an Administrative Law Judge acting on her behalf. For example, Section 1-12-207 addresses the procedure for filling a vacancy on a nonpartisan board. In addition, Uniform Election Code provisions in Section 1-13-107 [violation of duty by election official] or 1-13-108 [false statements relating to candidates designed to affect the vote] may address the misspelling of Complainant's name. Likewise, the counting of ballots is addressed in Section 1-7-305-309, C.R.S. Alleged violations of these Uniform Election Code provisions are addressed to the District Attorney or the Attorney General, not the Secretary of State, and contested election cases are to be heard by the district court for the county in which the contest arises. Sections 1-13-101 and 1-11-212, C.R.S.

The only remaining issue raised by the Complaint, *i.e.*, that Complainant was not invited to a non-District meeting of volunteer firefighters when candidates were introduced, must be dismissed for two reasons. First, the Complaint does not allege any action by the District or its Board. Although Mr. Chamberlain did speak at the meeting as a guest, he appeared in his individual capacity, as permitted by Section 1-45-117(1)(b)(II), C.R.S. Any complaint about who was invited to attend the meeting and how it was conducted should address the actions of the Inter-Canyon Fire Rescue, not the District. Second, the Complaint does not allege either any contribution made by the District in connection with this meeting or any election issue addressed by the contribution limitation of Section 1-45-117(1)(a)(I), C.R.S.

Respondents have therefore demonstrated that there is no genuine issue as to any material fact and have further demonstrated that they have not violated the FCPA and are therefore entitled to judgment as a matter of law. Accordingly, the motion for summary judgment is granted.

AGENCY DECISION

It is the Agency Decision that this Complaint is dismissed in its entirety.

The hearing scheduled for August 27, 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 **AGENCY DECISION** was sent U.S. Mail, postage prepaid, in Denver, Colorado to:

Sharon Schoening
8529 South Jay Lane
Morrison, CO 80465

Raule Nemer
Toussaint, Nemer & Coaty, P.C.
3081 Bergen Peak Drive, Suite 210
Evergreen, CO 80439

and via interoffice mail to: Donetta Davidson, Secretary of State, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on September ____, 2003.

Secretary to Administrative Law Judge

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